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88-1762

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT KIDD, et. al.,

Petitioners,

vs.

THE F/V ST. PATRICK, et. al.,

Respondants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Are Punitive Damages ever recoverable in Admiralty?

II. Are punitive damages recoverable by seamen killed due to wrongful acts occurring on the high seas, (i.e., covered by DOHSA) when their deaths are preceeded by conscious pain and suffering before death, (i.e., may DOHSA be supplemented by a survival action with a right to punitive damages?)

1. Should OffShore Logistics and Higginbotham be reversed?

2. May DOHSA be supplemented by:

   a. State law?

   b. The Jones Act?

   c. The general maritime law?

III. Did the 9th Circuit Court of Appeals commit errors of law in its application of the law of punitive damages or fail to give the District Court's findings proper deference in its denial of an award of punitive damages to surviving seamen injured through gross negligence?

LIST OF PARTIES

The parties to the proceedings below were Petitioners surviving seaman Robert Kidd, and the administrators or personal representatives of four deceased seamen's estates, P. G. Pair, Administrator of the Estate of Wilson Lee Pair, Thomas R. Ryker, Personal Representative of the Estate of Randall Ray Ryker; Salome B. Smith, Administratrix of the Estate of Charles Wayne Parlett; and Flora and Joel L. Stigall, as the Administrators of the Estate of Clifford S. Stigall, and Respondants, F/V ST. PATRICK in rem, St. Patrick, Inc., Daniel Whorton, Leroy Whorton, and William Wilson, (frequently referred to herein as "owners").

Also separate Appellees in the court of appeals below were one other surviving seaman, Wallace Thomas, and the administrators or personal representatives of five other deceased seamen's estates, Agnes Bergen, Administratrix of the estate of Thomas Karl Kauppinen, Shannon Lee Youhas Jobe, Administratrix of the Estate

of James Edward Jobe, Frank Romero, Personal Representative of the Estate of Ronnie Newton, James R. Sandin, Personal Representative of the Estate of Vanessa N. Sandin, Willard Gary Stallings, Personal Representative of the Estate of Gary Todd Stallings.

It is Petitioners Kidd et. al.'s understanding that these other Appellees below will be filing a separate cross-petition for certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT KIDD, P. G. PAIR, Administrator of the Estate of Wilson Lee Pair, THOMAS R. RYKER, Personal Representative of the Estate of Randall Ray Ryker; SALOME B. SMITH, Administratrix of the Estate of Charles Wayne Parlett; and FLORA and JOEL L. STIGALL, as the Administrators of the Estate of Clifford S. Stigall,	)
Petitioners,	)
vs.	)
F/V ST. PATRICK, ST. PATRICK, INC., DANIEL WHORTON, LEROY WHORTON, and WILLIAM WILSON,	)
Respondants.	)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners Robert Kidd et. al. respectfully pray for a writ of certiorari to issue to review the judgment and opinion of the United States Court of Appeals for the

9th Circuit entered in the above-entitled proceedings on May 7, 1987.

OPINION BELOW

The opinion of the Court of Appeals for the 9th Circuit entered May 7, 1987, is reported at 816 F.2d 1345 and at 1987 AMC 2024, and is reprinted in Appendix D hereto. Its opinion of February 22, 1989, granting rehearing is reported at 866 F.2d 318, and is reprinted in Appendix E hereto.

The decisions of the United States District Court for the District of Alaska, (von der Heydt, D.J.) below were not reported. His decision on liability is reprinted in Appendix A, and his decision on damages, in Appendix B hereto.

JURISDICTION

This petition for certiorari arises out of a petition for limitation of liability brought by Respondants pursuant to 46 USCA §185, arising out of a casualty to the F/V ST. PATRICK, on November 30, 1981. Petitioners

here brought claims in that limitation action. Petitioner Robert Kidd is a surviving seaman, alleging damages for personal injuries. [1] Joining Robert Kidd in this petition are the administrators or personal representatives [2] of the estates of four of nine deceased seamen who pursued causes of action for survival and wrongful death actions under the Jones Act, DOHSA, the general maritime law, and the law of Alaska, in that limitation action [3] below. Bifrucated trials on liability and damages on these claims were

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[1] Without prepayment of costs pursuant to 28 USC § 1916, and Supreme Court Rule 47.2.

[2] P.G. Pair, administrator of the estate of Wilson Lee Pair, Thomas R. Ryker, personal representative of the estate of Randall Ray Ryker, Salome B. Smith, administratrix of the estate of Charles Wayne Parlett, and Flora and Joel Stigall, as the administrators of the estate of Clifford S. Stigall.

[3] Another survivor, Wallace Thomas, and the administrators or personal representatives of the estates of the other five deceased seamen who pursued their claims below, are separately represented. Petitioners here understand that these parties intend to file cross-petitions for certiorari, joining in the arguments of petitioners herein, and asserting other arguments of their own.

held, and decisions thereafter rendered in findings of fact and conclusions of law entered May 5, 1985 (Apx. A) and April 10, 1986 (Apx. B) respectively, and judgments were entered in the District Court accordingly.

On Respondants' timely appeals, the 9th Circuit Court of Appeals on May 7, 1987, entered an opinion and judgment reversing the District Court's decisions in part and affirming in part, (Apx. D). On February 2, 1989, Petitioners here were granted rehearing in part and the Court of Appeals modified its May 7, 1987, opinion and judgment, (Apx. E).

The jurisdiction of this court to review the judgment of the 9th Circuit is invoked under 28 USCA §1254(1).

STATUTES INVOLVED

This case involves consideration of the Death On The High Seas Act, (DOHSA herein), 46 USCA 761 et seq., the Jones Act, 46 USCA §688(a), the Federal Employees Liability

Act, (FELA herein), 45 USCA §59, the Officer Competency Certificates Act, 46 USCA §224(a), and Alaska Statutes AS 09.55.570, and 44.03. 010-.040. These statutes are set forth in Apx. F-K.

STATEMENT OF THE CASE

Petitioner Kidd suffered his injuries and the other petitioners' decedents here suffered their deaths on November 30, 1981, when they were ordered by the unlicensed mate of the scalloper F/V ST. PATRICK, who had just assumed command in the temporary absence of the vessel's equally unlicensed captain, to abandon ship in a storm on the high seas off Marmot Island near the City of Kodiak, Alaska. At the time of her abandonment, the vessel was perceived to be foundering. Ten seamen were killed in the aftermath. [4] They died after their surviving shipmates observed them suffering from the agonies of hypothermia for

[4] Including the commanding mate whose estate brought but then abandoned his claim below.

varying lengths of time from 15 minutes to up to 12 hours while they drifted in flotation devices or survival suits before they were seen to expire or drift away, some never to be found. The two surviving crewmen were separated but eventually washed ashore on Alaska's uninhabited shores where they separately suffered in subfreezing temperatures, wet and unprotected, for approximately 12 more hours before they were rescued. As a result, survivor Robert Kidd suffered severe frost bite to his feet resulting in their partial amputations and effective loss of the use of them both, and resulting permanent disability. Both Kidd and survivor Wallace Thomas suffered immense pain, and severe emotional trauma at the sight of their shipmates' death or separation, resulting in severe and permanent emotional injuries.

Tragically, in one of the classic ironies of maritime annals, the unmanned F/V ST. PATRICK survived and was found the next day

still afloat in no danger of sinking! Ten men were killed and two severely injured because the ST. PATRICK's unlicensed acting master prematurely panicked.

More tragic still is the fact that merely two months before, another incident had prompted the U.S. Coast Guard in Anchorage to board the ST. PATRICK, at which time all her owners were made personally aware that the vessel's officers were discovered to be unlicensed as required by the Officer Competency Act, 46 USCA §224(a), and that this and other safety violations prohibited her operation on the high seas. To keep her operating her owners made promises to the Coast Guard inspector, a Lt. Walters, that the vessel would be moved no further than Homer, Alaska, (a voyage entirely through inland waters), and that before she sailed on the high seas her officers would qualify for and secure the necessary licenses. [5]

[5] The District Court further concluded that the test for these licenses specifically requires an examination of ship's officers in areas that could have prevented this accident. Apx. A, pg. 34, Conclusion 4.

But other than take the necessary license applications from Lt. Walters and hand them to the vessel's officers, these owners took no steps whatsoever to comply with the law or their promise and proceeded to directly take the vessel past Homer and on to the high seas repeatedly until her loss, with full knowledge that her officers remained unlicensed.

Finally on the day before the tragedy the owners' president personally was made aware that the unlicensed master departed the vessel temporarily leaving her in command of the unlicensed mate who was fishing her on the high seas, in total violation of the law, yet he did not order the mate to return the ST. PATRICK to port.

Petitioners brought claims alledging negligence under the Jones Act, and unseaworthiness under the general maritime law, and (in pertinent part to this petition) that the aforesaid conduct by Respondants was willful or wanton, reckless and indifferent to the

safety of their seamen and in contemptuous disregard of the Officers Competency Act enacted for their seamen's safety, and in contemptuous breach of their express August 31, 1981, promise to the Coast Guard Inspection Officer, Lt. Walters, to obey that act. Petitioners further claimed that this conduct raised to the level of gross negligence and amounted to the ST. PATRICK being in a condition of gross unseaworthiness which was personally known to her owners.

After a trial, the United States District court agreed and expressly and carefully entered Apx. A, pg. 10-21, 25-27, Findings 28-51, 63-66, upon competent evidence, supporting his decision, and carefully and accurately applied the law (Apx. A, pg. 33-34, 35-36, Conclusions 3-6, 10-14), to award each seaman or his estate $200,000 in punitive damages in addition to compensatory awards for injuries or predeath suffering and wrongful death, (Apx. B).

Respondants' timely appealed from the District Court's judgment to the 9th Circuit Court of Appeals invoking its jurisdiction under 28 USCA §1291 to review "final decisions" of district courts. Though the respondants on their appeal below conceded the propriety of survival awards to the deceased seamen and further conceded the legal basis for the award of punitive damages, (Apx. D, pg. 19, Fn. 3 infra), the 9th Circuit rejected the express conclusion by the District Court that punitive damages were legally recoverable for the deceased seamen, whether that remedy was predicated under Alaska state law, the Jones Act, the general maritime law, or DOHSA, despite the existance of pre-death suffering giving them a survival remedy. The overall basis of the decision of the court of appeals was that DOHSA (and the Jones Act) prohibited this result, because they contained language limiting damages to "pecuniary loss". The Court of Appeals then went on to address

the survivors' injury claims, to find that despite the aforedescribed facts expressly found by the district court, for a shipowner to be liable in punitive damages his conduct must be "willful" and the facts found by the district court did not rise to that level, and hence its award of punitive damages was held to be clearly erroneous. In all other respects the District Court's decisions were eventually affirmed, after an intervening remand for further finding by the District Court, Apx. C, as to the matters collateral to this petition, Apx. E.

REASONS FOR GRANTING THE WRIT

I. THE PROPRIETY OF AN AWARD OF PUNITIVE DAMAGES IN ADMIRALTY GENERALLY DUE TO GROSS NEGLIGENCE RESULTING IN CONDITIONS OF UNSEAWORTHINESS TO SEAMEN WHO SUFFERED PAIN BEFORE DEATH [6]

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[6] This argument's consideration is unnecessary to resolve the claims of the surviving seamen. See their argument, infra, Section III, pg. 29.

Prior to embarking upon a voyage into th technical statutory and decisional law surrou ing the award of punitive damages, Plaintiffs would briefly state that this case presents a important question of federal law which has not been, but should be settled by this court pursuant to the criteria of Supreme Court Rul 17.1(a) and (c).

Despite an indication as early as 1818 in The Amiable Nancy, 16 US (3. Wheat) 546, 4 L.Ed. 456 (1818), that punitive damages were available in marine law in a proper case, [7] modernly and only very recently has there eve been a reported award of punitive damages in maritime law at the circuit court level, Protectus Alpha Nav. v. Pacific Grain Growers 767 F.2d. 1379, 1385 (9th Cir., 1985); Evich v. Morris, 819 F.2d. 256 (9th Cir., 1987); Dyer v. Merry Shipping Co., 650 F.2d. 622,

[7] See also, LakeShore Railway Co. v. Prentice, 146 U 101, 13 S.Ct. 261, 37 L.Ed. 97 (1893).

624-625 & n. 9 (5th Cir., 1981); In Re. Marine Sulphur Queen, 460 F.2d. 89, 105 (2nd Cir., 1972), cert den sub nom Marine Sulphur Tranport Corp. v. Head, 409 US 982, 93 S.Ct. 318, 34 L.Ed.2d. 246 (1972); United States Steel Corp. v. Fuhrman, 407 F.2d. 1143, 1198 (6th Cir., 1969).

Modernly, however, this court has repeatedly affirmed the principal that punitive damages may upon a proper showing be recoverable. See International Brotherhood of Electrical Workers v. Foust, 442 US 42, 48, 99 S.Ct. 2121, 2125, 60 L.Ed.2d. 698 (1979); Carlson v. Green, 446 US 14, 64 L.Ed.2d. 15, 100 S.Ct. 1468 (1980). And, in Smith v. Wade, 461 US 30, 35, 75 L.Ed.2d. 632, 638, 103 S.Ct. 1625 (1983), this court affirmed the principal of punitive damages and its appropriate standards most convincingly, stating society has an interest in deterring and punishing all intentional or reckless invasions of the rights of others. 461 US 30,

54, 75 L.Ed.2d 632, 650, 103 S.Ct. 162J. See also, Silkwood v. Kerr-McGee Corp., 464 US 238, 78 L.Ed.2d 443, 104 S.Ct. 615 (1984).

Nevertheless, despite the recent holding within its own circuit of Protectus Alpha Nav. v. N. Pacific Grain Grow, 767 F.2d. 1379 (9th Cir., 1985), (relying on Smith v. Wade) and that of the other circuit courts, supra, a different panel of the 9th Circuit in this case below states, 816 F.2d. 1345, 1347, (Apx. D, pg. 19).

> "Whether or when punitive damages are available under the general maritime law is not entirely clear." (underline added)

The availability of punitive damages in maritime law has been the current and continued source of legal scholarly debate. Waddell, Punitive Damages In Admiralty, 19 Jour. Maritime Law and Commerce, 65, 69 (1988), sets forth a current and far more comprehensive analysis of the conflicting state of punitive damages in admiralty amongst the circuits than

space permits in this petition, and provides an excellent analysis of the 9th Circuit's opinion below here. Petitioners urge this court consider this article's argument as addressing Petitioners' duty under Supreme Court Rule 17. See also, note, Bergen v. F/V ST. PATRICK: Higginbotham Prevails - No Punitive Damages Under Death On The High Seas, 62 Tulane LR 1139 (1988); Weason v. Harville, 706 P.2d. 306, 1988 AMC 428 (Ak., 1985), and Baptiste v. Superior Court, 164 Cal. Rptr. 789 (1980).

Further reasons for the grant of certiorari in this case is the decision of this court in Bankers Life and Cas. Co. v. Crenshaw, __ US __, 108 S.Ct. 1645, 100 L.Ed.2d. 62 (1988), refusing to consider the federal constitutional issues to the award of punitive damages. This decision and the actions of this court in denying review of a number of other punitive damages cases decided at the same time has been generally viewed as a decision by this

court upholding the general principals of punitive damages at least until such time as there may be a through and clear development in the courts below of the problems with the concept and a majority concensus of judicial thinking emerges from this process. Ferry & Imre, Punitive Damages After Bankers Life & Cas. Co. v. Crenshaw, For the Defese LJ, 12 (Sept., 1988). [8] Only this court of course knows what future the federal constitutional attack on punitive damages holds. Assuming this court is not now predisposed to hear this issue, Petitioners respectfully suggest that the way which this court traditionally exercises its power to influence the development of American Common Law generally is through its power to decide the federal maritime common law, particularly where as

[8] This is certainly not such a case to address these issues; the vessel owners here hav ing conceded all legal basis for refusing an award of punitive damages below. 816 F.2d. 1345, 1349, Fn. 3. (Apx. D, pg. 19, Fn. 3).

here in these seamen injury and survival cases it has a completely free hand, as Congress has enacted no legislation whatsoever concerning a seaman's remedies in unseaworthiness, and little concerning negligence.

Finally there are definite present national interest and especially important reasons for this court's direct attention to punitive damages in admiralty. On September 9, 1988, Congress recognised the need for stronger guarantees for fisherman's safety in the passage of P.L. 100-424, 46 USCA §4501, et. seq. Then the recent national tragedy of the Exxon-Valdez, described in Newsweek, "Smothering the Waters", pg. 43, April 10, 1989, has drawn the nation's attention to the apparent gross negligence of an American supertanker, resulting in one of America's most pristine waterways and richest fisheries, becoming overnight a vast oil-soaked, smelly wasteland, having grave implications for all of Alaska

and America for years to come. Such events focus this nation and this court on the strong policy reasons that underly the award of punitive damages in appropriate instances.[9]

II. THE PROPRIETY OF AN AWARD OF PUNITIVE DAMAGES TO SEAMEN KILLED DUE TO WRONGFUL ACT ON THE HIGH SEAS WHO SUFFER PAIN BEFORE DEATH

1. OFFSHORE LOGISTICS AND HIGGINBOTHAM SHOULD BE REVERSED

This case returns this court to the issue expressly left undecided in Offshore Logistics v. Tallentire, 477 US 207, 215 Fn. 1, 91 L.Ed. 2d 174, 184 Fn. [4b], 106 S.Ct 2485 (1986). Yet Petitioners would be remiss in light of the close vote on that decision and the new make-up of this court if they did not ask this court to again reconsider the lack of uniformity that Offshore Logistics brings to this

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[9] This court may take judicial notice that there are 38 separate class action suits on behalf of thousands of victims filed in the Alaska District Court and more in the Western District of Washington already (with many more to come), all seeking punitive damages for the gross negligence of the Exxon-Valdez.

important area and suggest this court return to its analysis of the law's development before Mobil Oil Corp. v. Higginbotham, 436 US 618, 56 L.Ed.2d 581, 98 S.Ct. 2010 (1978). See Comment, Maritime Wrongful Death: A Rip-Tide Develops Off The United States Coast, 62 Tulane LR 597 (1988), and Edelman, Wrongful Death On The High Seas, Trial, (April, 1987), pg. 59, both highly critical of Offshore Logistics as were most of the comments to Higginbotham.

2. PUNITIVE DAMAGES PURSUANT TO A SURVIVAL REMEDY

In the absence of an award of punitive damages directly for the decedent's death, this court may alternatively consider upholding such an award as an ordinary element of recovery upon a proper factual showing in a survival action for the victim's predeath pain and suffering. Offshore Logistics, supra. The source of that remedy may be state law, the Jones Act or the general maritime law.

Petitioners will deal with each remedy successively.

a. AN ALASKA STATUTE PROVIDING FOR A SURVIVAL REMEDY

As previously observed, in OffShore Logistics at Fn. 1, this court expressly reserved the issue of whether a specific state statute applicable to the high seas could provide a survival remedy to supplement DOHSA. If it may, this would provide a remedy for at least predeath pain and suffering and where appropriate, punitive damages.

Alaska[10] statute, AS 09.55.570, provides a survival remedy. Horsford v. Estate of Hors-

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[10] Which is the state where the fishing vessel here was moored and delivering to and just beyond whose territorial limits the vessel was fishing. Alaska was the domicile of many of the seamen victims at the time of the accicent and of Defendant William Wilson, the vessel's shoreside manager and the holder of a 50% interest in the corporation which the 9th Circuit Court of Appeals affirmed the district court's finding was an "artifice and a sham". Bergen v. F/V St. Patrick, 816 F.2d. 1345, 1351) Apx. D, pg. 28; Compare Barbe v. Drummond, 507 F.2d 794, 797-798 (1st Cir., 1974).

ford, 561 P.2d. 722, 729 (Ak., 1977), which includes a cause of action for punitive damages. Doe v. Colligan, 753 P.2d. 144 (Ak., 1988); Tommy's Elbow Room v. Kavorkiam, 727 P.2d. 1038, 1048-1049, (Ak., 1986), Strum, Ruger & Co. v. Day, 594 P.2d. 38, 47 (Ak., 1979), mod. on reh'g 615 P.2d. 621 (1980), cert den 454 US 894 (1981).

Alaska's statutes expressly provide that all of her laws are to the extent possible applicable to the high seas. AS 44.03.010-.040. See also, Nygaard v. Peter Pan Seafoods 701 F.2d. 77 (9th Cir., 1983), and Alaska has without exception enforced her laws on the high seas to the fullest extent allowed. Corbin v. State, 672 P.2d. 156 (Ak. App., 1983), app dism 467 US 1223 1984); State v. Bundrant, 546 P.2d. 530 (Ak., 1976) reh den 547 P.2d. 838 app dism sub nom ; Uri v. Alaska, 429 US 806 (1976); F/V American Eagle v. State, 620 P.2d. 657 (Ak., 1980), app dism. 454 US

1130 (1982), including the regulation of scallop fishing at issue here. State v. Sieminski, 556 P.2d. 929 (Ak., 1976).

The 9th Circuit below did not extensively address the applicability of Alaska's survival statute here to recover for the deceased plaintiffs' predeath pain and suffering, because that award was not contested by respondants, and sustained on the Jones Act, Apx. D, pg. 17, Fn. 2, (discussed infra). But the 9th Circuit did expressly address the issue stating at 816 F.2d. 1345, 1349, Apx. D, pg. 18:

> "We hold that where an action under DOHSA is joined with a Jones Act claim neither statutory scheme may be supplemented by the general maritime law or by state law." (underline added for emphasis.)

b. THE JONES ACT

The 9th Circuit's express holding at 816 F.2d 1345, 1347, Apx. D, pg. 11, that punitive damages may not be awarded under the Jones Act simply fails to be logically consis-

tant with its own analysis in Cook v. Ross Island Sand & Gravel Co., 626 F.2d. 746, 748-749 (9th Cir., 1980), wherein it recognized a cause of action for predeath pain and suffering and expressly stated:

> "Yet while the Jones Act arguably may apply a pecuniary loss restriction to the personal losses of a decedent's beneficiaries, the Act does not apply a pecuniary loss restriction to the injuries of a decedent himself."

In so holding Cook relied upon the express holding of this court to that effect in Gillespie v. United States Steel Corp., 379 US 148, 156-158, 13 L.Ed.2d. 199, 205-206, 85 S.Ct. 308, 313-314, (1964), and 46 USCA §688 of the Jones Act which incorporates FELA, 45 USCA §59, by reference. This section expressly provides that a cause of action for personal injuries before death survives. See also, Michigan C.R. Co. v. Vreeland, 227 US 559, 57 L.Ed. 417, 33 S.Ct. 192 (1913); and St. Louis I.M. & S R. Co. v. Craft, 237 US 648, 59 L.Ed. 1160, 35 S.Ct. 704 (1915).

Surrounding Bergen's error below in this regard and apparently influencing it was the Court of Appeal's repeated desire to also remain consistant with its decision in Kopczynski v. The Jacqueline, 742 F.2d. 555, 561 (9th Cir., 1984), cert den, 471 US 1136 (1985), holding that punitive damages are not recoverable for a seaman's injury. On carefu analysis however, it can be seen that Kopczynski an injury case, was simply wrongly decide

As was pointed out in Ivy v. Security Barge Lines Inc., 606 F.2d. 524 (5th Cir. 1979) relied upon in Cook, the 1908 FELA was interpreted in Vreeland to limit recovery for death to pecuniary loss and to provide no survival of an action for pre-death suffering But in 1910 Congress anticipated Vreeland and amended FELA to provide an express survival statute §59, which then incorporated by reference in the Jones Act of 1916, 46 USCA §688.

Kopczynski is in error because it fails to recognize this distinction. Noticeably all of the cases it relies upon to hold that there is no recovery beyond pecuniary loss for injury are in fact FELA/Jones Act death cases. [11] Kopczynski fails to recognize Gillespie, Craft and 45 USCA §59, and to the extent it influenced the decision of the court below, places the 9th Circuit in direct conflict with the 5th Circuit in Merry Shipping and justifies review under the Supreme Court Rule 17.1(a).

c. A GENERAL MARITIME LAW CAUSE OF ACTION FOR SURVIVAL

After the Court of Appeal's decision below, 816 F.2d 1345, Apx. D, another panel of

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[11] A similar error is reached in the poorly researched case of State Ex. Rel Northern Inc. v. District Court, 548 P.2d. 1390 (Mt., 1976), the opposite result is reached in Baptiste v. Superior Court, 164 Cal. Rptr. 789 (1980). An excellent article comprehensively reviewing the area and critical of Kopczynski but also failing to discern this point is Note, Admiralty-Damages-Punitive Damages Not Available Under The Jones Act. Kopczynski v. The Jacqueline, 742 F.2d 555 (9th Cir., 1984), 16 Seaton Hall L.R. 589 (1986).

the 9th Circuit three weeks later decided Evich v. Morris, 819 F.2d 236 (9th Cir. 198 cert den 108 S.Ct. 261 (1988). Thereafter 5th Circuit decided Graham v. Milky Way Bar Inc., 824 F.2d 376 (5th Cir., 1988). See also, Snyder v. Whittaker Corp., 839 F.2d 1 (5th Cir. 1988); Churchill v. F/V FJORD, supra, and Favaloro v. S/S Golden Gate, 687 FS 475 (N.D. Cal., 1987). These cases, rec nizing a cause of action for predeath suffe ing which survives (and those preceeding Offshore Logistics to the same effect) have received overall favorable academic aclaim. Nagy, The General Marine Law Survival Actio What Are The Elements of Recoverable Damage 9 U. of Hawaii LR 5 (1987); Schoolcraft, The Maritime Survival Action and Future Earnings 18 Jour. of Maritime Law and Commerce 89 (1987); note, Fifth Circuit Allows Coupling Survival Actions Under General Maritime Law With DOHSA Claim: Azzopardi v. Ocean Drillin & Exploration Co., 11 The Maritime Lawyer, (1986).

The decision of Bergen, refusing to recognize that petitioners' claim for punitive damages under a general maritime law survival claim or any other survival action under state law or the Jones Act, puts it in direct conflict with Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984) and every other circuit that has considered the issue thereby justifying review. Supreme Court Rule 17.1(a).

In Petitioners view this error has pervaded the entire 9th Circuit's opinion in Bergen with the view that punitive damages for injury be it "predeath" injury or otherwise are not viewed favorably by this court. This in turn leads the 9th Circuit below to conclude that because punitive damages are arguably not available to the decedents survivors under DOHSA or the Jones Act, (and under an erroneously decided Kopczynski to a personal injury victim) they should not be available under any predeath "survival" action. The essence of

the 9th Circuit's error is captured in the language:

> "If all of those actions could be supplemented by the general maritime la DOHSA's preemption of maritime law woul be nullified". 816 F.2d. 1345, 1349. (Apx. D, pg. 18.)

The error in this analysis is that DOSH does not preempt maritime law; it only "pre-empts" (or in the language of this court in OffShore Logistics at 477 US 207, 216), "speaks directly" to "death" damages. To hold otherwise of course is to suggest that DOHSA intended to address personal injuries, which it does not, and leads to the absurd conclusion that it is better to kill a victi than to merely injure him, which is contrary to this court's recent ruling in Carlson v. Green, supra, consider also Silkwood v. Kerr-McGee, supra. The Jones Act's incorporation of the FELA §59 express survival remedy compels the conclusion that Congress never intended to limit a seaman's recovery for personal injuries, or "pre-death" suffering.

III. THE NINTH CIRCUIT COURT OF APPEALS COMMITTED ERRORS OF LAW AND FAILED TO GIVE THE TRIAL COURT'S FINDINGS OF GROSS NEGLIGENCE PROPER DEFERENCE IN ITS DENIAL OF PUNITIVE DAMAGES TO EVEN THE SURVIVING SEAMEN

Having spent the bulk of its opinion concerning the legal entitlement of seamen killed due to negligence and unseaworthiness under circumstances which give rise to DOHSA, the 9th Circuit in three brief paragraphs, at 816 F.2d 1345, 1349, (Apx. D, pg. 18-20), then proceeds to render all of the far reaching law it has proclaimed on the subject obiter dictum when it then proceeds to declare the trial court's findings supporting the award of punitive damages to the severely injured but surviving crewmen of this terrible casualty to be clearly erroneous. [12]

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[12] The conduct resulting in awards to the surviving severely injured seamen was the same conduct that gave rise to the punitive damages awards to the survivors of the deceased seamen. Conversely if this court were to conclude as a matter of law that no award of punitive damages was permissible to deceased seamen, (despite uncontradicted predeath suffering) it would still be faced with the review of the award

footnote continued pg. 30

An analysis of the district court's find
ings of fact on issue of liability, No. 28-51
63-64, 66; Conclusions 3-6, 11-13, (Apx. A),
and Findings of Fact on Issues of Damages, No
1, (Apx. B), reveals quite clearly that the
9th Circuit's opinion, 816 F.2d. 1345, 1349-
50, (Apx. D, pg. 19), was not true to the
district court's findings. It not only sub-
stituted its judgment for the district court'
but totally ignored, or grossly mischaracter-

of punitive damages to the surviving seamen when they bring a cause of action for unseaworthiness joined with a Jones Act cause. Such an award is no prohibited by any act of Congress, and clearly permissible under the general maritime law. As noted by the court of appeals below, 816 F.2d 1345, 1349, Fn. 3, Apx. D, pg. 19, the defending vessel owners conceded there was a legal basis for the award. A review of the entire 9th Circuit opinion below leads one to observe that having exhaustivel reviewed the law in the course of attempting to demonstrate no basis for the award of punitive damages for a DOHSA death despite the existance of substantial pre-death suffering, the 9th Circuit, rather than face the obnoxious result that punitive damages may be awarded those who fortuitously survived (and in the process have to address whether its holding in Kopczynski was wrongly decided, discussed supra), chose instead as almost an afterthought as its only escape from this philosophical dilemma to ignore the district court's findings.

ized the district court's findings and clearly failed to follow the legal standard of review mandated by this court. In doing so it articulated law pertaining to the award of punitive damages which differs from that of all the other circuits, (and decisions within its own circuit), and the law on punitive damages generally dicated by this court.

In United States v. United States Gypsum Co., 333 US 64, 395, 92 L.Ed. 746, 766, 68 S.Ct. 525 (1948), this court first applied the "clearly erroneous" standard and defined the scope of review of a finding by the district court by the court of appeals as:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In McAllister v. United States, 348 US 19, 20, 99 L.Ed. 20, 24, 75 S.Ct. 6 (1954), this court further applied US Gypsum's holding to findings of a district court upon what is

frequently referred to as the "ultimate" finding of negligence. See also, 9 Wright & Miller, Federal Practice & Procedure, §2590 (1971), and equally significant to this case, announced that though the court of appeals properly applied the Gypsum standard, this court would review such a ruling on a petitio for certiorari when it disagreed with the court of appeals' result, stating:

> "In relation to the district court' findings, we stand in review in the same position as the court of appeals."

In reaching this result, this court rejected strong, and frequently repeated dissent of Justice Frankfurter, that urged that review o a court of appeals' decision reversing a district court's finding as clearly erroneous was not a proper grounds for a petition for certiorari. See also, Ferguson v. Moore-McCormack Lines, 352 US 521, 524 1 L.Ed.2d. 511, 515, 77 S.Ct. 457, 459 (1956), and Crumady v. "Joachim Hendrik Fisser", 358 US 423, 3 L.Ed.2d. 413, 79 St. 445 (1959);

Guzman v. Pichirilo, 369 US 698, 8 L.Ed.2d. 205, 82 S.Ct. 1095 (1962). See also, Dick v. New York Life Ins. Co., 359 US 437, 3 L.Ed. 935, 79 S.Ct. 921 (1959). [13]

More recently in Anderson v. Bessemer City, 470 US 564, 571, 84 L.Ed.2d. 518, 527, 105 S.Ct. 1504 (1985), this court undertook an extensive reanalysis of the fact finding authority of the district court and the function of a court of appeals in reviewing then, and reminded the court of appeals that in applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must consistantly have in mind that their function is not to decide factual issues de novo, and that the court of appeals may not reverse even though convinced that had it been sitting as the trier of fact,

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[13] These decisions thereby establish this court's authority to review this issue under Supreme Court Rule 17(a), as a far departure from the accepted and usual course of judicial proceedings.

it would have weighed the evidence different

ly, This court then concluded:

> "Where there are two permissible views of the evidence, the fact finder choice of the evidence cannot be clearl erroneous."
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> *
> *
> *
>
> "This is so even when the district court's findings do not rest on credi- bility determinations, but are based instead on physical or documentary evidence or inferences from other facts." 470 US 564, 574, 8 L.Ed.2d. 518, 528.

See also, Icicle Seafood Inc. v. Worthington

475 US 709, 89 L.Ed.2d 739, 106 S.Ct. 1527

(1986).

An analysis of the district court's

liability findings (Apx. A) 28-51, 63-64, 66

on this issue, supra, when compared to the 9

Circuit's opinion, demonstrate irreconcilabl

conflict with what the district court found

even with the facts articulated by the 9th

Circuit itself, 816 F.2d. 1345, 1346, Apx. D

pg. 7. Simply stated the district court did

not as the 9th Circuit suggested, find these

vessel owners grossly negligent merely because they "disregarded" the officer Competency Act, 46 USC §224a, which required that this vessel have licensed officers, but rather the district court expressly found these owners should have known of the mandates of this law well before the Coast Guard ever boarded the ST. PATRICK on August 31, 1981, and found her in noncompliance; (Apx. A, Finding 34-35). And much more significantly, that when following her boarding by the Coast Guard, the ST. PATRICK was detained, Bill Wilson, the Defendants' shoreside manager, officer, and 50% "owner" of this "sham" corporation, expressly promised Lt. Walter, the U.S. Coast Guard officer in charge of the boarding, that if he would release the vessel, Wilson would take the vessel no further than Homer, Alaska, (a passage which required no high seas travel), and that before the vessel left Homer for the high seas, a properly licensed officer would

be put aboard. (Apx. A, Finding 36-37). Admittedly as the 9th Circuit pointed out at 816 F.2d 1345, 1349, Apx. D, pg. 16, the testimony of the owners supports they knew t ST. PATRICK officers had obtained licensing forms; they obtained them through Wilson whi the vessel was in Anchorage during the Coast Guard inspection and its immediate aftermath (Apx. A, Finding 38)! But the district cour also found that Wilson not only knew that th vessel's officers had not obtained the licen when he shortly thereafter sent the vessel through high seas waters to Kukak Bay to buy crab, Finding 41, but that thereafter when i early October he converted the vessel back t scalloping and sent her to Kodiak where he knew she would be operating in high seas waters, Wilson not merely "disregarded" the Officer Competency Act, but that he knew he "was clearly violating his promise to Lt. Walter and "willfully, wantonly, competemp-tuously, and repeatedly disregarding the

dictates of the Officer Competency Act, Findings 45, comliance with which the Court found could have prevented this accident, Apx. A, Conclusion 4. (The vessel after all survived even after the unlicensed master in panic ordered the crew to abandon ship.)

The district court further observed that the act of the owners in permitting the vessel to proceed on the high seas upon these circumstances was "at least impliedly directing the vessel to proceed with unlicensed officers", (Apx. A, Conclusion 13), and was done for "financial gain" Apx. A, Finding 45, li. 19-20. The court found similar contemptuous conduct by LeRoy Whorton, Apx. A, Finding 46, and Daniel Whorton, Apx. A, Finding 51. LeRoy Whorton, the Defendants' president, not only knew the vessel was commanded by unlicensed officers, but that the vessel's unlicensed captain had temporarily left the vessel in the command of the unlicensed mate, and that only

the mate was operating her on the high seas a full day prior to the loss; yet the mate was never directed to return to port. Apx. A, Finding 49-50, 63.

Turning from the district court's findings to the court of appeals review thereof, this court should first address whether the 9th Circuit in Bergen even articulated the proper standard of law pertaining to gross negligence, and in failing to do so, created by its holding a conflict with a decision by another federal court on the same issue. As the Bergen court at 816 F.2d 1345, 1349 Apx. D, pg. 16, appears to view the law, even though a person willfully violates a law, if that person makes any step toward compliance with the law, that act may not constitute gross negligence?

Petitioners are not, of course, suggesting that the mere violation of a law constitutes gross negligence or even that a knowing

violation of law must constitute gross negligence. An analysis of the district court's opinion reflects the district court was well aware of that principle. Conclusions on Liability (Apx. A) No. 3-6, 10-14. And the District Court clearly did not find these vessel owners grossly negligent merely because they violated the Officer Competency Act or even because they knowingly did. On the contrary the proper principal of law is stated by another panel's review of another decision concerning punitive damages by the very same district judge below in Churchill v. F/V FJORD, 857 F.2d. 571 (9th Cir., 1988), pet. for reh. pending, wherein despite a finding that an 18 year old vessel operator was intoxicated with alcohol and marijuana, [14] 857 F.2d. 571, 573, the district court found the

[14] In violation of AS 05.25.060(b), which provides:
(b) A person may not operate a watercraft whether for recreational purposes or any other purpose in violation of AS 28.35.030 on the waters of the state while under the influence of any intoxicating liquor, narcotic drug, barbiturate or marijuana.

absence of the requisite intent and denied punitive damages. See also, Protectus Alpha Nav. Co. v. North Pacific Grain Growers, 767 F.2d. 1379, 1385 (9th Cir., 1985), which in turn applies the standards of Smith v. Wade, 461 US 30, 75 L.Ed.2d. 632, 103 S.Ct. 1625 (1983).

The district court's liability decision here did not have the benefit of Protectus Alpha decided later in 1985, but instead relied on United States v. Furhman, 407 F.2d. 1143 (6th Cir., 1969), which nevertheless expresses the same proper law as did this court in Smith v. Wade, and applied it under circumstances very similar to the facts in this case. The 9th Circuit here on the other hand chose to totally ignore Furhman and Smith v. Wade throughout its opinion and took the holding of Complaint of Merry Shipping, 650 F.2d. 622, 625 (5th Cir., 1981), out of context. On the contrary, the Bergen court appears to hold that the award of punitive

damages may only be predicated on a willful violation of a duty rising to the level of "actual malicious intent", which this court clearly held was unnecessary in Smith v. Wade. In its holding the Bergen court points the 9th Circuit on a course that diverges markedly from the 5th Circuit and 6th Circuit in Merry Shipping and Fuhrman. See also, In Re. Marine Sulphur Queen, 460 F.2d. 89, 105 (2nd Cir., 1972). [15] As this Court in Smith v. Wade, supra, recognized, "criminal indifference" is the proper standard.

In the final analysis whether the 9th Circuit applied the proper standard or not, it was clearly within the district court's discretion under these facts to find criminal indifference here. In so holding the district court was ultimately passing judgment on these Defendants' state of mind when they committed

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[15] And from the well-reasoned decision of another panel, in its own circuit, Protectus Alphus, supra.

the violations of the Officers Competency Act at issue here. The something "more" that the 9th Circuit court required here is clearly satisfied by the August 31, 1981, Coast Guard boarding of the vessel, the express pointing out by the Coast Guard of the legal requirement for licensed officers, and the express promise by Defendants' manager, officer and major stockholder Wilson, as a condition of the vessel's release from Anchorage that the vessel would have licensed officers onboard before the vessel left inland waters at Homer, Alaska. In this sense the violation here is like the case of the drunk driver who is stopped by police and given a warning, on the condition he park his car and wait for a cab. Instead the driver gets back in and drives down the road to an accident as soon as the officer leaves the scene.

The district court's adjudication of a state of mind is the type of adjudication that is particularly due great deference under this

court's holding in Anderson v. Bessemer City, supra. The district court after all is present to see and hear the testimony, and can sense if the owners are respectful or contemptuous in their views toward the law. The District Court is uniquely capable of determining whether these owners sincerely expected their officers to get licensed or whether the delivery of the license applications to their officers was as futile as tossing the applications in a corked bottle over the side of the ship, [16] Petitioners confidentially assert that if the liability trial transcript of these owners is brought before this court together with the deposition of Lt. Walters, which constitutes the entire record on this issue, it will be very short, and its review

[16] An analysis of the Officer Competency Act and the regulations promulgated pursuant thereto reveals these licenses are not merely given by the filling out of a form; the licenses are earned through sea time and extensive testing. See Appendix A, Conclusion 4.

will have no semblence of "justification" for this violation. There was no testimony in the record that these license violations were either tacitly excused by the Coast Guard in its August 31, 1981, boarding, or that any attempt at compliance other than the mere handing of the licenses to the officers was attempted. What little was done, was not done in good faith. On the contrary, the district court expressly found the respondants' conduct to be "contemptuous" of this law, and of their promise to the Coast Guard. Apx. A, Findings 45-51. Finally this violation becomes particularly onerous when one considers that not only was no attempt to secure the licenses attempted, but thereafter the vessel's unlicensed skipper left the vessel in charge of the unlicensed and less experienced mate to operate, and the owners' president (who was aware no licenses were ever obtained by any officer, Apx. A, Finding 46), was personally

made aware of this abandonment of command by marine radio one full day prior to the casualty, but never did he order the vessel back to port. Apx. A, Finding 49-50. These additional facts clearly place these owners' conduct within the express decision of United States Steel Corp. v. Furhman, Protectus Alpha, and Smith v. Wade. As this court so clearly pointed out in Anderson, supra, this is not a decision the district court was compelled to reach, but it was certainly within his province, (and one which Petitioners believe many if not most judges would reach). Having reached that decision, this decision is not to be reversed unless both the Court of Appeals and this Court are left with the definite and firm conviction that a mistake has been committed. Since this cannot be done, this Court should grant certiorari, and the decision of the 9th Circuit Court of Appeals should be reversed with instructions to reinstate the award of punitive damages to

the surviving crewmen.

CONCLUSION

The law of punitive damages in admiralty generally and specifically its applicability to death on the high seas accompanied by pre-death pain and suffering and in injuries to seamen who join causes of action under the Jones Act for negligence, and the general maritime law for unseaworthiness, is in disarray. There is divergance between the circuits and the courts of several states on these issues. This case presents an opportunity to resolve these conflicts and to announce law on punitive damages in this court's own special sphere of maritime common law that may by its lead give guidance to all states in their proper sphere of announcing their common law. Such an accouncement is of particular national importance as the public focuses on the proper role of punitive damages generally and their role in admiralty specifically.

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Finally, this case presents an opportunity to correct the grave injustice done by the Court of Appeal's misapplication of the proper law of punitive damages to the facts or its misapplication of the proper standard of review to the careful findings of the District Court.

This Court should therefore grant this Petition for Certiorari, review these decisions below, reverse the Court of Appeal's denial of punitive damages to all petitioners, and reinstate the judgment of the District Court awarding them punitive damages.

Respectfully Submitted this 25 day of April, 1989, from Kodiak, Alaska.

Gerald W. Markham
Attorney for Petitioners

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

AGNES BERGEN, Administratrix of the Estate of Thomas Karl Kauppinen; SHANNON LEE YOUHAS JOBE, Administratrix of the Estate of James Edward Jobe, ROBERT KIDD; R.G Pair, Administrator of the Estate of Wilson Lee Pair; FRANK ROMERO, Personal Representative of the Estate of Tonnie Newton; THOMAS R. RYKER, Personal Representative of the Estate of RANDALL RAY RYKER; JAMES R. SANDIN, Personal Representative of the Estate of Vanessa R. Sandin; SALOME B. SMITH, Administratrix of the Estate of Charles Wayne Parlett; WILLARD GARY STALLINGS, Personal Representative of the Estate of Gary Todd Stallings; FLORA B. STIGAL, and JOEL L. STIGAL, Individually and as Administrators of the Estate of Clifford S. Stigal; WALLACE R. THOMAS; ROBERT O. WASHBURN and BLANCHE WASHBURN, d/b/a Marine Transportation,

Plaintiffs,

vs.

F/V ST. PATRICK, ST. PATRICK INC., DANIEL WHORTON; LEROY WHORTON, and WILLIAM WILSON,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON ISSUE OF LIABILITY

A 82-170 CV

The above cause upon trial of the issue of liability only, came before the court on May 29, 30, and 31, 1984. Following the close of all the evidence the court heard final argument of counsel, whereupon the matter was taken under advisement by the court. Proposed findings of fact, conclusions of law and objections thereto have been considered by the court.

The court finds by a preponderance of the evidence the following:

FINDINGS OF FACT

1. On November 29, 1981, at approximately 11:30 P.M., Alaska Standard Time, the F/V ST. PATRICK O/S No. 293243, having become beset by weather while operating in the waters of Marmot Bay, bounderied by the major islands of Marmot, Afognak and Kodiak, took large waves on the port beam, causing damage to said vessel,

particularly rendering her main engine inoperative, and confusion and panic among her crew.

2. Following either a direct order and/or what was reasonably perceived by the vessel's crew to be direct orders of the acting master Cornelius Samuel Green and/or failure of authoritative leadership, the crew of twelve, including the master, entered directly into the Alaska winter water, nine of the crew wore survival suits, and three wore only life preservers. Two of the crew survived, after suffering exposure to the cold to varying degrees. Seven crewmen's bodies were recovered, and three crewmen's bodies were not, and they have been judicially presumed dead.

3. The F/V ST. PATRICK, at the time of the casualty, was a steel hull 458 gross ton, 240 net ton fishing vessel, 132.2 feet in length, 27.2 feet

in breadth, and drew 13.8 feet of water, powered by a 750 horsepower diesel engine.

4. In the year 1980 Daniel and LeRoy Whorton, fishermen and vessel owners of substantial experience fishing on the East Coast, were attracted to purchase the F/V ST. PATRICK by one John Doody, a fisherman who had interests in various vessels, fishing scallops off the coasts of Oregon and Alaska.

5. According to the Whortons, the ST. PATRICK was a relatively larger, heavily powered fishing vessel, capable of performing the activity of towing the heavy dredges across the rocky ocean bottom that is frequently required to scallop fish in certain areas.

6. A Virginia corporation, St. Patrick, Inc., was formed to purchse the F/V ST. PATRICK, and its articles of incorporation were issued October 2, 1980. The initial directors listed on file with the

State of Virginia were the Whortons and John Doody.

7. The initial capitalization of the corporation was approximately $15,000.00.

8. On or about October 6, 1980, the corporation purchased the F/V ST. PATRICK for $310,000.00, and financed the purchase through a preferred ship's mortage to C.I.T. Corporation.

9. Mr. LeRoy Whorton testified that an organizational meeting was held, but despite requests for production served upon him, he has failed to produce copies of any organizational minutes or the minutes of any other corporation meetings either to claimants or at trial.

10. Mr. Leroy Whorton testifed he was designated president and Daniel Whorton acted as secretary/treasurer of the corporation.

11. As matters developed, Doody wanted to retain the vessel in the cod and pollack

fishery on the East Coast; the Whortons wanted to fish the vessel for scallops in Alaska. As a result, Doody decided to sell his interests in the vessel to the Whortons, and this occurred by sale of Doody's stock to the corporation.

12. This sale was accomplished by a unanimous consent to action by stockholders and directors of St. Patrick, Inc., dated March 1, 1981, and agreement of said sale.

13. The Whortons then interested William Wilson of Anchorage, Alaska, in the F/V ST. PATRICK.

14. Mr. Wilson was a fisherman experienced with fishing various species of fish in Alaska, including running one of the larger catcher processor vessels in the Bering Sea king crab fishery; he was in possession of capital which the Whortons needed to convert the ST. PATRICK to the scallop fishery.

15. On April 13, 1981, William Wilson formally purchased 25 shares of stock from each Leroy and Daniel Whorton, in exchange for cash, notes and equipment. In addition, the corporation allegedly purchased certain equipment from Leroy and Daniel Whorton, half of which ($42,000 in stated value) the Whortons asserted they had acquired from William Wilson, and the other half of which ($42,000) was allegedly acquired by the corporation directly from Wilson.

16. The equipment is referred to in various exhibits not attached to the agreements, but is found at Ex. T, Ryan depo., p. 16. In consideration therefore, the corporation issued 25 shares to Wilson. Following this series of transactions, LeRoy and Daniel Whorton each owned 50 shares of stock in St. Patrick, Inc., and Mr. Wilson owned 100 shares. Mr. Wilson

testified that he could not recall whether he at any time signed a bill of sale conveying the agreed equipment to the corporation, and produced no evidence to support that such occurred as he testified. Mr. Daniel Whorton testified he never saw the equipment.

17. It was the agreement of the Whortons and Wilson that William Wilson would not simply be a stockholder in the corporation, but that he would be at least the shoreside manager in control of the Alaska venture for the ST. PATRICK, responsible for fishing operations on the vessel, and eventually, as he acquired the expertise in scalloping, the master of said vessel.

18. It was the agreement of the parties that Leroy Whorton, Daniel Whorton and William Wilson be the board of directors for St. Patrick, Inc.

19. The vessel ST. PATRICK, according to Whorton, underwent repairs and upgrading in Virginia prior to navigating to the West Coast

to participate in the scallop fishery. The expense for the work performed were paid by Whorton Brothers Seafoods, which according t them was reimbursed by St. Patrick, Inc. Th were no formal promissory notes or agreement executed memorializing these transactions, n was any interest charged St. Patrick, Inc. b the Whorton Brothers for the monies advanced

20. The accounting records of the corpo ation following the departure of Mr. Doody from the corporation are incomplete. The on time accountant of the Whortons and St. Pat- rick, Inc., was unaware of any corporate ban account; and to his knowledge no corporate t returns ever were filed.

21. From a financial accounting standpo the records were incomplete regarding corpor- ate transactions.

22. In late April, 1981, the ST. PATRIC departed the East Coast, traveled through th Panama Canal, and arrived in Los Angeles, wh claimant Robert Kidd joined her. The vessel

then traveled north and began scalloping off the coast of Oregon.

23. While scalloping off the coast of Oregon (and throughout the vessel's voyage until the casualty), the crew was always paid in cash.

24. During the time the vessel was fishing off the coast of Oregon, Leroy Whorton would travel there from Virginia to pick up the vessel's proceeds of the catch in cash.

25. Although Daniel Whorton testified that the proceeds of the Oregon deliveries were deposited in the Virginia National Bank, Hampton, Virginia, and that the checkbook for that account and the deposit slips were turned over to the corporate attorney; the corporate attorney testified that he never had possession of the corporate checkbook. The checkbook, stubs, and deposit slips were neither produced at the depositions of the corporate attorney Ryan or at any other time to plaintiffs, despite their requests, nor were they

produced at trial by defendants. If a corporate bank account were maintained, the corporation could have obtained copies of the records from the bank to support its claim to a corporate bank account at trial.

26. In the absence of any documentary or corraborative evidence to support defendants' claim to the existence of a corporate checkin account, the court finds under the circumstances that the defendants' testimony to its existence is not credible, and that the greater weight of the evidence indicates that the corporation failed to keep a separate corporate bank account at any time after its incorporation.

27. After a time in Oregon the ST. PATRICK was moved to Alaska because of diminishing profits.

28. In Alaska the vessel scalloped off Kodiak Island, but the vessel was producing little or no revenue, the venture had been losing money for some time, and a decision

was made to install freezer equipment on the vessel, which was done in Anchorage, Alaska.

29. While in Anchorage on the night of August 30-31, 1981, the ST. PATRICK broke a mooring line which caused the intervention of various other vessels to prevent serious damages, and as a result of which the United States Coast Guard in the person of its agent Lt. Walters conducted an informal safety inspection of said vessel the morning of August 31, 1981.

30. As a result of his inspection Lt. Walters found the ST. PATRICK to be in violation of various federal laws, regulations, or navigational rules, and specifically relevant to this litigation, that the vessel was not manned by a requisite Coast Guard licensed master, chief engineer, and officer of the watch or licensed mate, as required by 46 USC § 224(a), and that the ST. PATRICK failed to possess proof of financial responsibility required by 46 CFR 542.3(b), the latter

deficiency resulting in the seizure of said vessel to insure compliance.

31. As a result of the Coast Guard's actions, Mr. William Wilson contacted Lt. Walters on behalf of the ST. PATRICK regarding the deficiencies, and Mr. Wilson met with Lt. Walters in his office in the Coast Guard offices of the Alaska federal court house and office building. Also present in Anchorage was a Mr. Jack Van Divort, who had an interest in at least the freezer equipment being mounted on the ST. PATRICK.

32. During the course of this conversation, Lt. Walter called Norfolk, Virginia, by speaker phone, and advised the Virginia party as he had Mr. Wilson and Mr. Van Divort that the ST. PATRICK was lawfully required to have a licensed master, mate and engineer. The parties stipulated before trial that this call was made to Leroy Whorton. At trial, however Mr. Wilson and Leroy Whorton testified without objection that this conversation was with

Daniel Whorton.

33. The court resolves this factual conflict to be that the phone conversation was with Daniel Whorton. However, this discrepancy is of no significance, as Leroy Whorton testified that he spoke to Daniel Whorton a substantial period before the casualty and Daniel Whorton made him aware of the phone conversation, and the requirement that the ST. PATRICK have licensed officers to operate on the high seas, and that its officers were not so licensed.

34. Shortly following the August 31, 1981 boarding by Lt. Walter, and well before the November 30, 1981, casualty, William Wilson, Leroy Whorton and Daniel Whorton each had personal knowledge of this legal requirement, and that the ST. PATRICK would be in violation of law if operated on the high seas without licensed officers.

35. The requirement of licensed officers on larger vessels over 200 ton is well known

on the East Coast, and defendants Leroy Whorton, Daniel Whorton and William Wilson, as experienced owners and operators of fishing vessels, should have been aware of it without Lt. Walter's specific advice.

36. By September 2-3, 1981, the vessel's deficiencies had been corrected to Lt. Walter satisfaction except for the licensed officer requirement, and Mr. Wilson asserted that he was quite anxious to move the ST. PATRICK out of Anchorage, because it was incurring expenses there, and the purpose for it being there (the loading of freezer equipment) had ended. Mr. Wilson represented that he desired to move the vessel to Homer, and that there a properly licensed crew would be on the vessel before the ST. PATRICK was navigated upon high seas waters.

37. Lt. Walter concluded that since the waterway between Anchorage and Homer was not "high seas", but "inland waters" for the purposes of the vessel manning requirement,

that he could not prevent the vessel from sailing to Homer with an unlicensed crew.

38. Before leaving Anchorage Mr. Wilson obtained the applications for the officers: Licenses tc comply with the Officers Comptency Act, and also the applications for Z-cards, which he was advised the seamen themselves would require if the ST. PATRICK was processing rather than fishing.

39. Operating the ST. PATRICK, a vessel of 458 gross tons, well larger than the 200 gross tons limit of 46 USC §224(a) on the high seas was manifestly unsafe without licensed officers.

40. The ST. PATRICK remained in Homer for two or three weeks undergoing additional conversions.

41. While in Homer, Wilson asked the master Palmer on one occasion if the requisite licenses had been obtained; Palmer stated he was pursuing it, but Wilson was aware that they were not acquired before the vessel left

for Kukak Bay to buy and process dungeness crab.

42. The re-outfitting of the vessel for crab processing was completed in Homer, Alaska Duirng the period of time Mr. Wilson purchased numerous items for the vessel, using his personal funds. He did not receive a promissory note from the corporation for these funds, nor were arrangements made for reimbursement.

43. The crab processing venture proved unprofitable, and the vessel returned to Homer in October, 1981, where the freezing module was removed and the scalloping gear was placed back on board. The vessel then departed Homer for Kodiak to fish scallops in the Kodiak Island area.

44. William Wilson knew that during the Kodiak scalloping, the vessel would be operating, while scalloping, primarily in high seas waters as defined in Station Order 27, which marks the boundary of the high seas for purposes of the Officer Competency Act, 46 USC

§224(a), Ex. X, and during this period he had repeated contact with the vessel and her master when it delivered in Kodiak, having had contact recently before the casualty and at no time did he believe that the vessel's officers had obtained the requisite licenses.

45. In permitting the ST. PATRICK to travel to Kodiak to engage in scalloping, having personal knowledge that her crew officers had not obtained the requisite licenses, William Wilson was clearly violating his promise to Lt. Walter, and willfully, wantonly, contemptuously, and now repeatedly disregarding the dictates of the Officer Competency Act, 46 USC §224(a), and said act was in reckless disregard of the safety of the ST. PATRICK's crew in the pursuit of financial gain for, among others, himself.

46. Leroy Whorton personally knew that the ST. PATRICK was required by law to have licensed officers to comply with the Officer Competency Act since at least shortly after

the late August, 1981, phone call to Daniel Whorton, who in turn advised him of same; he had also spoken to William Wilson about the matter, and on several occasions he spoke with the master Al Palmer and was advised that Palmer himself had not secured the requisite licenses, but was merely "working on it". And Leroy Whorton similarly knew that at least while scalloping in Kodiak, the vessel would not be operating in inland waters, but rather in high seas waters, probably beyond sight of shore. In permitting the ST. PATRICK to travel to Kodiak to engage in scalloping, having personal knowledge that her officers had not obtained the requisite licenses, Leroy Whorton, who was the president and director of this corporation, and also took much responsibility for its operations through calls to him in Virginia, willfully, wantonly and contemptuously disregarded the dictates of the Officer Competency Act, 46 USC §224(a), and said act as in reckless disregard of the safety of the

ST. PATRICK's crew in a fishery which he himself admitted, "is a dangerous business", in the pursuit of financial gain for, among others, himself.

47. Shortly before the casualty, Mr. Palmer (the master of the vessel) departed the vessel to attend to a family emergency, and delivered control to Mr. Green, the vessel's mate.

48. The evidence is in conflict as to whether Leroy Whorton or Daniel Whorton or William Wilson ever knew Palmer left the vessel in Green's command before the start of the voyage on which the casualty occurred. Because there is ample evidence of willful and wanton neglect on their behalf in the repeated failure to see that the veseel's officers were licensed, it is accordingly unnecessary to resolve this conflict.

49. As to Leroy Whorton, it is also unnecessary to resolve this conflict, because Leroy Whorton admits that he was contacted

through the marine operator one day prior to the casualty by Mr. Green, the vessel's mate, and advised that Mr. Palmer had left the vessel, and it was out fishing.

50. At no time during the conversation did Leroy Whorton direct Green to stop fishing and return to port though he clearly had that authority. In permitting the ST. PATRICK to continue to fish under the command of Mr. Green, the mate, in the absence of the more experienced (but nevertheeless unlicensed regular master, Mr. Palmer, with the knowledge that neither Green nor the engineer, nor whomever would be acting mate had obtained the requisite licenses, Leroy Whorton was willfully, wantonly, and contemptuously disregarding the dictates of the Officer Competency Act, 46 USC §224(a), in reckless disregard of the safety of the ST. PATRICK's crew in the pursuit of financial gain for, among others, himself.

51. Mr. Daniel Whorton was the secretary/

treasurer of St. Patrick, Inc. and on its board of directors. He had commanded and owned fishing vessels for many years with his brother Leroy. Daniel Whorton was expressly advised of the requirement of licensed officers on the ST. PATRICK by Lt. Walter's late August, 1981, phone call. Dan Whorton was the office manager for the venture, and stayed in the office 99% of the time. Palmer and Wilson called the Virginia offices frequently; Daniel Whorton was aware that the vessel ST. PATRICK had returned to scallop fishing. In permitting the ST. PATRICK to return to scallop fishing without ascertaining that her officers had retained the requisite licenses, Daniel Whorton was willfully, wantonly, and contemptuously disregarding the dictates of the Officer Competency Act, 46 USC §224(a), in reckless disregard of the safety of the ST. PATRICK's crew in the pursuit of financial gain for, among others, himself.

52. At the time of the casualty and the

day prior thereto, the ST. PATRICK was clear operating in high seas waters as defined in Station Order 27, which makes the boundaries of high seas waters for purposes of the Officers Competency Act, 46 USC §224(a), Ex. X, off Marmot Bay, approximately thirteen miles southeast of Marmot Island, at the point marked by Wallace Thomas, Red No. 2, and where Pete Mineo found its debris, Green Letter S.

53. Mr. Thomas came on watch at 12:00 noon on November 19, 1981. The vessel continued fishing although the weather was deteriorating. A storm warning was received in the wheelhouse in the presence of Mr. Jobe, the acting mate or navigator of the watch on the voyage in the absence of Mr. Palmer, but the vessel nonetheless continued fishing.

54. Mr. Green came on watch at 6:00 P. and instructed the crew to bring the scallop dredges back on board, because it was too

rough to continue fishing. He did not direct the vessel to return to Kodiak or to safe harbor, despite the fact that this port was but a few hours running time away, and safe harbor was even closer.

55. The casualty was immediately caused by large waves hitting the port beam, causing the vessel to roll over to such a point that water poured into the vessel's air intakes, flooding the main engine, and causing it to quit.

56. From the onset of the storm until the casualty, the F/V ST. PATRICK was negligently operated with side to the seas, rather than bow to the seas, contrary to safe practices. This failure caused the F/V ST. PATRICK to roll severely when hit by the large wave just described, and was a proximate cause of the accident.

57. The casualty was compounded by the failure of the vessel's unlicensed officers to maintain calm and order among the crew in

the crew's reasonable apprehension of danger immediately proceeding and following these waves, which rendered the main engine inoperative.

58. The casualty was further compounded by the failure of the vessel's owners and agents to have a survival suit on board for every crewman, an orderly procedure for storage of same, and for the donning of same for giving a distress or May Day, for taking an emergency locator beacon, and for activating and entering the vessel's life raft, the lack of which contributed to the crew's confusion and panic.

59. The casualty was further compounded by the failure of the vessel's unlicensed officers to conduct a thorough damage survey of the vessel before giving the command, or what was reasonably perceived to be the command, of the acting master to abandon shi

60. The casualty was further compounded as to all but Robert Kidd and Clifford Stiga

who had abandoned the ship separately by the statement in the presence of the unlicensed engineer that the vessel's batteries would explode when the water below deck reached their level.

61. As a proximate result of each of the negligences in findings 55-59, the entire crew (except Kidd and Stigal with respect to finding 59), of the ST. PATRICK suffered extreme predeath fear and anxiety.

62. Following the abandonment of ship, these crewmen suffered extreme predeath pain, suffering, fear and anxiety to various degrees, and personal injuries, as will be described herein, as a proximate result of the negligence of findings 55-59.

63. The negligence and resulting injuries are the direct and proximate result of the gross negligence of defendants St. Patrick, Inc., William Wilson, Leroy Whorton, and Daniel Whorton. The lack of properly qualified licensed officers rendered the F/V

ST. PATRICK unseaworthy, and directly contributed to these negligent acts, and was in all likelihood the primary cause of this disaster. The grossly negligent actions of Leroy Whorton in not recalling the vessel to port upon learning of the regular unlicensed master's departure, was a further proximate cause of the disaster.

64. Although as the court found as a matter of law, the failure to properly man th F/V ST. PATRICK is negligence per se as such action violates the Officer Comptency Act, 46 USC §224(a), the court would reach this finding even were it not required to do so, and in fact the court finds the negligence here to be gross and wanton, reckless disregard for the lives of the vessel's crew.

65. Although as the court has found as a matter of law the violation of the Officer Competency Act, 46 USC §224(a) would have required the defendants to prove that their negligence could not have caused the casualty

even if this substantial legal burden was not placed upon them, but merely the ordinary causation standards, the court would find and would have found that the defendants' acts were the proximate cause of claimants' deaths and injuries.

66. The foregoing findings make it unnecessary to resolve the gross negligence of the failure of the vessel to carry a proper survival suit for every crewman.

67. The F/V ST. PATRICK did not sink, but was located adrift in Ishut Bay, Afognak Island, November 30, 1981, by a commercial airlines pilot, and salvaged by the F/V NELLE BELLE under the command of Pete Mineo, who transferred her to a Washburn tug. Had the crew of the ST. PATRICK been ordered to "stay with the ship", they would in all probability have survived.

68. The actions of the crew in abandoning ship were not contributorily negligent; they were either following a direct order, or what

they reasonably perceived to be a direct order. It was not their place to question the command of the acting Captain Green. The fact that Green himself abandoned ship is the best evidence that the crew's perception of the order was reasonable.

69. Nor were the actions of the acting mate or engineer in remaining on the vessel without proper licenses comparatively negligent. There is no evidence that these ordinary crewmen knew of the law or that their ship was large enough to come within it.

70. As a direct and proximate result of the aforesaid negligence, Todd Stallings, Randy Ryker, Tom Kauppinen, Clifford Stigal, James Jobe, Charles Parlett, Wilson Pair, Ronnie Newton and Vanessa Sandin suffered for varying periods and died, and Wallace Thomas and Robert Kidd suffered personal injuries for which the plaintiffs are entitled to damages which shall be establishe at a second trial thereon.

71. The St. Patrick, Inc., a Virginia corporation, existed in name only, at least by the time of the departure of John Doody from the corporation. It was grossly undercapitalized; the shareholders used its property as their own, intermingling personal and company funds indiscriminately without executing or maintaining the proper debt instruments, and either kept no company bank account, or if one was kept, their failure to produce same leads to the conclusion that its existence would further support comingling and exhaustion of the corporate assets. Since the defendants conducted their transactions in cash, so far as the court can tell, it is inferrable that any claim to adequate capitalization that the corporation may have had at the time of Mr. Doody's departue was quickly dissipated amonst its three stockholders.

72. Claimants carried their burden of establishing, by a preponderance of the evidence, that the corporation was an artifice

and a sham designed to execute illegitimate purposes in abuse of the corporate fiction and the immunities that it carries, and that its activities in reality were those of Willi Wilson, Leroy Whorton, and Daniel Whorton.

73. Claimants carried their burden of establishing by a preponderance of the evidence the failure to observe corporate formal ities, the nonpayment of dividends, the insol vency of the corporation at the time of the accident, siphoning of funds of the corporation by the dominant stockholders, the nonfunctioning of other officers as directors (other than the Whortons and Wilson), absence of corporate records of any significance, and that the corporation is merely a facade for the operations of the Whortons and Wilson and their mere instrumentality "alter ego".

74. The initial capitalization of the corporation at $15,000.00 to engage in a fishery with an extremely large vessel capable of employing the twelve men on board

at the time of the casualty and more in what defendants themselves recognized as a highly dangerous business, followed by the losses the vessel experienced, and the fact that any profits it had were accounted for only in cash, a total lack of any corporate records, the failure to convey equipment allegedly contributed by Wilson, support the previous finding.

75. There was a unity of interest and ownership between St. Patrick, Inc., and the shareholders, such that the two no longer existed as separate entities. The Whortons and Wilson totally disregarded that existence to the point of not depositing the proceeds of the fishing deliveries in a bank account.

76. The failure to disregard the corporation would result in fraud or injustice. Young seamen employed on large fishing vessels such as the ST. PATRICK have a right to expect (with their limited knowledge of corporate laws) that the operation is at least suf-

ficiently capitalized to insure compliance with the basic laws for their safety such as the Officer Competency Act, 46 USC §224(a).

CONCLUSIONS OF LAW

1. This case involves personal injury and death to American merchant seamen resulting from the operation of an American fishing vessel, the F/V ST. PATRICK, OS No. 293243, in the high seas waters off Marmot Island and Afognak Island, near Kodiak, Alaska. The vessel was at the time of the instigation of Robert Kidd's suit in rem in this district, and the vessel owners' petition for limitation of liablity was transferred to the District of Alaska at Anchorage pursuant to the motion of Robert Kidd, from the United States District Court for the Eastern District of Virginia.

2. This court has jurisdiction of this controversy pursuant to 46 USC §688 (Jones Act), 46 USC §§761-768 (Death on the High Seas Act), 46 USC §§181-195 (Limitation Act),

and the general maritime law. Venue is proper in this court.

3. Vessels over 200 gross ton operating on the high seas for over a twelve hour period, as the F/V ST. PATRICK was at the time of this casualty, as defined by Station Order No. 27, Claimants' Ex. a, 46 USC §224(a)(12)(2), 33 USC §151, are required to have a United States Coast Guard licensed master, mate (or officer of the watch), and engineer.

4. The test for these licenses specifically requires an examination of the master, mate and engineer in areas that could have prevented this accident. See 46 CFR §10.15-31(b)(2)(IV),(c)(IV),(e)(2).

5. A vessel operated without the requisite licenses is unseaworthy. [1]

[1] The duty to observe licensing statutes is imperative and all must respect it whether they approve of its wisdom or not; but that it is founded upon the highest considerations of the laws of humanity, looking to the safety of life and limb, and the preservation of property, goes without saying. The failure to comply with licensing statutes has frequently received the severest condemnation of the courts. Rowe v. Brooks, 329 F.2d. 35 (4th Cir., 1964).

6. The operation of a vessel without the requisite licenses, in violation of a safety statute is negligence per se.

7. In reaching its findings, the court has determined that the standard to pierce the corporate veil in a seaman's maritime injury and death case is a federal standard, and apply those guidelines enunciated in Seymore v. Hull & Moreland Engineering, 605 F.2d. 1105 (9th Cir., 1975), in resolving this question.

8. However, were the court to apply the doctrine of either Alaska or Virginia on piercing the corporate veil, it would reach the same conclusions.

9. Regardless of defendants' liability under a piercing of the corporate veil, it is the general, if not universal rule that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefore.

10. In Kopczynski v. The Jacqueline, 742 F.2d. 555 (9th Cir., 1984), it is expressly held that in this circuit punitive damages were not recoverable for Jones Act negligence, but the question of their recovery for unseaworthiness under the general damages may properly be assessed in admiralty in an appropriate case of unseaworthiness.

11. A condition precedent to awarding punitive damages is a showing by the claimants that petitioners St. Patrick, Inc., William Wilson, Leroy Whorton, and Daniel Whorton were guilty of gross negligence or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct.

12. It has specifically been held that punitive damages may also be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing that master. [2]

[2] United States Steel Corp. v. Furhman, 407 F.2d. 1143 (6th Cir., 1969).

13. The acts of the petitioners in permitting and at least impliedly directing the vessel to proceed with unlicensed officers were done knowing, or having reason to know, of facts which would lead a reasonable man to realize not only that their conduct created an unreasonable risk to the crew, but also that such risk is reasonably greater than that which is necessary to render their conduct negligent.

14. Claimants are entitled to general and also punitive damages as they may prove at a trial to be set.

DATED at Anchorage, Alaska, this 7th day of March, 1985.

(s/) James A von der Heydt
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

AGNES BERGEN, Administratrix of the Estate of Thomas Karl Kauppinen; SHANNON LEE YOUHAS JOBE, Administratrix of the Estate of James Edward Jobe; ROBERT KIDD; P.G. PAIR, Administrator of the Estate of Wilson Lee Pair; FRANK ROMERO, Personal Representative of the Estate of Ronnie Newton; THOMAS R. RYKER, Personal Representative of the Estate of RANDALL RAY RYKER; JAMES R. SANDIN, Personal Representative of the Estate of Vanessa N. Sandin; SALOME B. SMITH, Administratrix of the Estate of Charles Wayne Parlett; WILLARD GARY STALLINGS, Personal Representative of the Estate of Gary Todd Stallings; FLORA B. STIGAL and JOEL L. STIGAL, individually and as Administrators of the Estate of Clifford S. Stigal; WALLACE R. THOMAS; ROBERT O. WASHBURN and BLANCHE WASHBURN, d/b/a Marine Transportation,

Plaintiffs,

vs.

F/V ST. PATRICK St. PATRICK INC.; DANIEL WHORTON; LEROY WHORTON; and WILLIAM WILSON,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON ISSUE OF DAMAGES

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THIS CAUSE now comes before the court for entry of its findings of fact and conclusions of law upon the issue of damages. The court earlier has entered comprehensive findings of fact and conclusions of law upon the liability issue. Therefore, the court enters its

FINDINGS OF FACT UPON ISSUES OF DAMAGES

1. The deaths and personal injuries received by the plaintiffs and plaintiffs' decedents in this action were caused by the negligence, and the gross, willful and wanton misconduct of each defendant herein named.

2. The descriptions of the deaths and injuries under the hostile conditions according to the evidence adduced in this trial, leaves no doubt that the crewmen who died from exposure, hypothermia and drowning, experienced severe pre-death pain, pre-death suffering, extreme fear, extreme emotional and mental trauma, terror and horror in the knowledge of their impending deaths.

3. The court finds that Robert Kidd and Wallace Thomas, although surviving the ordeal, nevertheless, suffered serious debilitating, permanent mental, physical and emotional trauma, and each suffered and will continue to suffer from such mental, emotional and physical trauma in the future.

4. Specifically with regard to Wallace Thomas, the court finds that Mr. Thomas suffered and continues to suffer from serious emotional distress, including recurring nightmares, and bouts of severe depression rendering him unable to cope with his daily life causing irrational and unfounded feelings of guilt.

5. The court further finds that Mr. Thomas suffered the physical impairment of sinusitis as a result of being exposed in the water for 18 to 20 hours and several hours thereafter on land.

6. The court finds that the mental, emotional and physical trauma occurring to

Mr. Thomas on board the ST. PATRICK and during the course of his ordeal in the sea, and the emotional trauma of helplessly watching his crew mates die including the continuing mental and emotional strain evident in his life today, as well as the physical impairment, justifies an award to him for such damages and injury.

7. The court finds that Robert Kidd suffered serious mental and emotional harm, as well as severe, debilitating physical injuries to his feet and lower legs.

8. The court finds that but for his injuries Robert Kidd would have continued to work in the fishing industry as a scallop fisherman in Alaska where Mr. Kidd could maximize his talents as a fisherman and maximize the monetary gains of his endeavors.

9. The court finds that Mr. Kidd suffered and continues to suffer extreme mental and emotional harm from the ordeal.

10. In addition to the extreme mental and emotional harm suffered during and as a result of the ordeal, Mr. Kidd also experienced traumatic stress syndrome and mental and emotional harm by virtue of being deprived of this long standing desire to earn his livelihood as a seaman.

11. Decedents Randal Ryker, Todd Stallings and Thomas Kauppinen died beyond three miles of shore. All others that died expired within three miles of shore within Alaska's territorial seas. The deaths and injuries to all were the result of negligence and unseaworthiness that occurred both within and without Alaska territorial waters as the vessel was navigated in her fishing endeavors.

12. As to the estate of James Jobe, the court finds that the decedent, James Jobe, suffered severe emotional and physical trauma prior to his death on board ship and while exposed to the sea water, and, in particular, his suffering was compounded by observing the

death of his half-brother, Tom Kauppinen.

13. The court also finds that Shannon Jobe and the Jobe child were dependent upon James Jobe and would have benefited from his lifetime earning capacity, society, support, services, and nurture had he lived.

14. The court determines that the uncontroverted economic appraisals of Dr. Solie and the testimony of Captain Burke are adequate bases upon which to award damages to the surviving dependents of James Jobe.

15. The court finds that Thomas Kauppinen, Gary Stallings and Randy Ryker entered the water without survival suits upon the orders of the ship's master.

16. The court finds that each of these young crewmen suffered severe and agonizing pre-death fear and terror during the course of their ordeal until they succumbed to the final effects of hypothermia.

17. While of relatively short duration, the court nevertheless finds that the pre-

death death pain and suffering, agony, terror, fear, and emotional distress of each was extreme.

18. As to Vanessa Sandin, Ronnie L. Newton, Chuck Parlett, Wilson Pair, and Clifford Stigal, the court finds that each young crew member suffered extended periods of agony, fear, terror, mental and emotional trauma, and while not as intense as the immediate intense fear, cold and trauma experienced by Kauppinen, Stallings and Pair, they each suffered for many hours until they succumbed to the cold sea water encroaching through their survival suits, or as in the case of Chuck Parlett while attempting to swim to shore through the breaking surf.

19. With regard to the earning capacity of Kauppinen, Pair, Newton, Stallings, Ryker, Parlett, Stigal and Sandin, the court finds that the earning capacity has been sufficiently established as awards hereafter are entered, even though the work life history of the

young crew men was not extensive.

20. The court accepts the uncontradicted studies offered by Dr. Solie and the testimony of Captain Burke and adopts the same for purposes of these findings and conclusions.

21. The court finds Mrs. Stigal, the quadriplegic mother, and Mr. Stigal, the totally disabled father of Clifford Stigal, were dependent upon him for their support and are entitled to the pecuniary value thereof.

22. The court finds the named parents of all the other deceased discussed herein were dependent upon their children for services and future support and are entitled to the pecuniary value thereof.

23. Except for pre-death pain and suffering and the pecuniary value of lost services to their wrongful death beneficiaries, the court recognizes that in the absence of proof of dependency, the law in this circuit would preclude further award of damages.

24. The cases are in conflict as to the

proper measure of damages under maritime death cases and have by and large departed from the otherwise clear guidelines provided by Moragne v. States Marine Lines, 348 U.S. 375 (1970), as later interpreted by Sealand Services v. Gaudet, 414 U.S. 573 (1974). The holdings in those two cases taken together would permit a recovery in the areas described below. However, some cases subsequent to Moragne and Sealand have rendered unclear the proper measure of damages amounts as well as the propriety of awarding damages to seamen who die without proof of dependency. Mobile v. Higgenbothum, 436 U.S. 618 (1978).

25. Therefore, this court determines that in the interest of justice, findings will be entered in favor of plaintiffs reconciling any difference by virtue of the court's long standing tradition of giving great deference to the claims of seamen. [1]

[1] The court also is aware that the United States Supreme court has granted certiorari in the conflicting circuit cases of Nygaard v. Peter Pan Seafoods 701 F.2d 77 (9th Cir. 1983), and Tallentire v. Off-Shore Logistics, 754 F.2d 1274 (5th Cir. 198).

26. In considering the award of punitive damages against the defendants, the court carefully has considered the further testimony of defendants in addition to their testimony during the trial on liability, and notes that adequate findings of fact have heretofore been entered on this issue.

27. Although it is difficult not to be sympathetic to the causes of these unfortunate young people, the court finds that awarded damages must be reasonable in light of all the facts and circumstances proven to the court, and may not be based upon sympathy or like emotion.

28. As to each plaintiff, the court finds damages awardable as follows:

A. WALLACE THOMAS is entitled to recover damages as follows:

a. For the terror of the accident, abandoning ship at sea, intense pain and cold, and the emotional trauma of

watching his shipmates die, fear and anxiety prior to rescue $200,000.00

b. For severe long term debilitating physical, mental and emotional damage, including severe depression rendering him unable to cope with his daily life, causing him irrational and unfounded feeling of guilt 225,000.00

c. Punitive damages 200,000.00

TOTAL: $625,000.00

B. JAMES JOBE's estate is entitled to recover damages as follows:

a. For conscious pre-death pain and suffering: $200,000.00

b. Based upon the testimony of Dr. Solie and Captain Phil Burke, lost support, services and loss of inheritance to the wife and child of James Jobe 2,119,992.00

c. Loss of care, nurture and training to his minor child 51,000.00

d. Punitive damages 200,000.00

TOTAL: $2,570,992.00

C. VANESSA SANDIN's estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

b. I find the loss of support, services and loss of inheritance to her parents is in the amount of $160,322. In the event that it is subsequently determined on any appeal, only a loss of services is recoverable, I find $150,000 of this award is attributable to a loss of services to them, $75,000 to each parent. 160,322.00

c. Punitive damages 200,000.00

TOTAL: $560,322.00

D. GARY TODD STALLINGS' estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

b. I find the loss of support, services and loss of inheritance to his parents is in the amount of $524,243. In the event that it is subsequently determined

on any appeal that only a loss of services is recoverable, I find $200,000 of this award is attributable to a loss of services to them, $100,000 to each. $524,243.00

c. Punitive damages: 200,000.00

TOTAL: $924,243.00

E. THOMAS KAUPPINEN's estate is entitled to recover:

a. For conscious pre-death pain and suffering: $200,000.00

b. I find the loss of support, services and the loss of inheritance to his mother is in the amount of $713,339. In the event that it is subsequently determined on any appeal that only a loss of services is recoverable, I find $200,000 of this award is attributable to a loss of services to them, $100,000 to each parent. 713,339.00

c. Punitive damages 200,000.00

TOTAL: $1,113,339.00

F. RONNIE LEE NEWTON's estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

b. I find the loss of support, services and loss of inheritance to his mother is in the amount of $501,555. In the event that it is subsequently determined that only a loss of services is recoverable, I find $100,000 of this award is attributable to a loss of services to her. 501,555.00

c. Punitive damages 200,000.00

TOTAL: $901,555.00

G. RANDY RYKER's estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

b. I find the loss of support, services, and loss of inheritance to his parents is in the amount of $418,290. In the event that it is subsequently determined on any appeal that only a loss of services is

recoverable, I find $200,000 of this award is attributable to a loss of services to them, $100,000 to each parent. $418,290.00

c. Punitive damages 200,000.00

TOTAL: $818,290.00

H. CHARLES PARLETT's estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

b. I find the loss of support, services and loss of inheritance to his mother is in the amount of $690,606. In the event that it is subsequently determined on any appeal that only a loss of services is recoverable, I find $100,000 of this award is attributable to a loss of services 690,606.00

c. Punitive damages 200,000.00

TOTAL $1,090,606.00

I. WILSON PAIR;s estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

b. I find the loss of support, services and loss of inheritance to his parents is in the amount of $528,097. In the event that it is subsequently determined on any appeal that only a loss of services is recoverable, I find $200,000 of this award is attributable to a loss of services to them, to each parent. 528,097.00

c. Punitive damages 200,000.00

TOTAL: $928,097.00

J. CLIFFORD STIGALL's estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

b. I find the loss of support, services and loss of inheritance to his parents is in the amount of $176,233. In the event that it is subsequently determined on any appeal that only a loss of services is recoverable, I find $100,000 of this award is attributable to a loss of services to his quadriplegic mother and

$50,000 to his father	176,233.00
c. Punitive damages	200,000.00
TOTAL:	$576,233.00

K. ROBERT KIDD is entitled to recover damages as follows:

a. Future foreseeable maintenance and cure	$50,000.00
b. For the terror of the accident, abandoning ship at sea, intense pain, cold and the emotional trauma of seeing his friend Doc Stigall disappear	200,000.00
c. For the pain and suffering from rescue to trial	100,000.00
d. Permanent disability of the loss of his feet and their deformity as testified to by Dr. Mills	150,000.00
e. Permanently disabled as a scallop fisherman and that had he not been injured, he would have been employed in the Alaskan scallop fisheries earning sums comparable to those which Captain Burke testified were predictable today. Due to his injuries and	

limited training, he is almost completely unable to work, and after psychological and vocational training will be only able to earn a minimal wage, and is, therefore, entitled to past and future lost income based on Dr. Solie's analysis.	2,255,837.00
f. Plaintiff Kidd will suffer future pain of future surgeries and hospitalization, and I find $100,000 will compensate him for this future pain	100,000.00
g. Punitive damages	200,000.00
TOTAL:	$3,055,837.00

CONCLUSIONS OF LAW UPON THE ISSUE OF DAMAGES

1. The court has jurisdiction.

2. Each of the plaintiffs were severely injured by virtue of the negligent, careless, wanton, willful and intentional conduct of the defendants herein. The sums awarded are supported by the evidence and justified by the facts and otherwise constitute reasonable compensation for the individual claimants.

3. That the maritime laws of the United States allow and support the awards indicated.

4. Robert Kidd is entitled to a lien of first priority to defendants' limitation and for the future maintenance and cure and attorneys' fees incurred for his cure awarded above. All other damages shall be satisfied pro rata from the remainder of the bond, and thereafter by execution against defendants in personam.

5. That the plaintiffs shall each have judgment as to the amounts indicated herein and that such judgment shall bear interest at the legal rate until paid and satisfied in full.

6. Plaintiffs are awarded prejudgment interests and costs as allowed by local rules.

7. That each plaintiff shall prepare and submit a judgment indicating the amount awarded with costs and interest allowed by these conclusions of law and findings of

fact.

8. That execution upon this judgment may go forth upon the expiration of ten days following its entry on the docket.

DATED at Anchorage, Alaska, this 10th day of April, 1986.

(s/) JAMES A. VON DER HEYDT
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

AGNES BERGEN, Administratrix of the Estate of Thomas Karl Kauppinen; SHANNON LEE YOUHAS JOBE, Administratrix of the Estate of James Edward Jobe; ROBERT KIDD; P.G. PAIR, Administrator of the Estate of Wilson Lee Pair; FRANK ROMERO Personal Representative of the Estate of Ronnie Newton; THOMAS R. RYKER, Personal Representative of the Estate of Randall Ray Ryker; JAMES R. SANDIN, Personal Representative of the Estate of Vanessa N. Sandin; SALOME B. SMITH, Administratrix of the Estate of Charles Wayne Parlett; WILLARD GARY STALLINGS, Personal Representative of the Estate of Gary Todd Stallings; FLORA B. STIGAL and JOEL L. STIGAL, individually and as Administrators of the Estate of Clifford S. Stigal; WALLACE R. THOMAS; ROBERT O. WASHBURN and BLANCHE WASHBURN, d/b/a Marine Transportation,

Plaintiffs,

vs.

F/V ST. PATRICK; ST. PATRICK, INC.; DANIEL WHORTON; LEROY WHORTON; and WILLIAM WILSON,

Defendants.

SUPPLEMENTAL FINDINGS OF FACTS

A 82-170 Civil

THIS CAUSE comes before the court on remand from the Court of Appeals "to permit the district court to amplify its findings with regard to dependency and services". The court has entered eight supplemental findings below with respect to the seven awards for lost support and services that remain in issue.

Plaintiffs have requested additional findings with respect to the lost inheritance awards. These matters were not within the scope of the remand. The court's supplemental findings relate only to its alternative awards with respect to lost support and services alone.

Before the Court of Appeals, defendants made the remarkable and highly misleading assertion that certain depositions listed below had not been admitted into evidence. All parties understood that these depositions were to be considered by the court. That is why defendants filed, after the trial, written

objections to some of the testimony in the depositions.

In making its awards for lost support and services, presently at issue, the court carefully read and considered the following depositions which were among those filed with the court [1] (and which remain in the possession of the court): P.G. Pair, Janice Shields, Katrina Smith, Thomas R. Ryker, Salome B. Smith, Jan Romeo, Freddie Lee Pair. The court noted defendants' objections to portions of the testimony. It was unnecessary to consider any of the purportedly objectionable testimony contained in the depositions of Janice Shields, Katrina Smith, or Jan Romeo. The same is true of the purportedly objectionable testimony of Salome Smith, with the exception

[1] All other depositions filed with the court were, of course, read and considered as well, but not in connection with the awards presently before the court.

of the following passages: p. 25, lines 21-24 (admitted under FRE 804(b)(5)); p.26 lines 6-11 (not irrelevent); p.29 lines 6-19 and p.29 line 23 to p. 30 line 12 (not irrelevant; hearsay addmitted under FRE 804(b)(5)); p.68 line 24 to p.69 line 5 (same). The court has not reread the depositions or reexamined the trial transcript in preparing these supplement findings, although it has refreshed its recollection as to certain particulars.

Therefore, the court enters its

SUPPLEMENTAL FINDINGS OF FACT WITH REGARD TO DEPENDENCY AND SERVICES

1. The court finds that all of the decedents were young people whose earnings and capacity to assist their parents financially would have increased in future years.

2. The court finds that Charles Parlett provided invaluable assistance with child-raising and other services and support to his mother, that he was an especially family-

oriented person, and that he would have continued to provide support and services as he and his mother matured.

3. The court finds that Ronnie Newton had provided significant services and support to his family in the past and that he was an especially responsible person who would have continued to provide support and services to his mother in the same and other ways as he and his mother matured.

4. The court finds that Wilson Lee Pair had provided valuable support and services to his parents in the past, including the period after he left home, and finds that he would have continued to do so as he and his parents matured.

5. The court finds that Vanessa Sandin had contriubted valuable services and support to her family in the past and finds that she was a generous person who would have continued to do so in the same and other ways as she and her parents matured.

6. The court finds that Gary Todd Stallings had provided goods and services to his parents in the past and that he was a generous person who would have continued to provide support and services in the same and other ways as he and his parents matured.

7. The court finds that Thomas Karl Kauppinen was particularly devoted to his parents and family, that he had provided valuable services and support to them in the past, and that he would have continued to do so in the same and other ways as he and his parents matured.

8. The court finds that Randall Ryker had provided valuable support and services to his family in the past, and that he would have continued to do so in the same and other ways as he and his parents matured.

DATED at Anchorage, Alaska, this 28th day of March, 1988.

(s/) JAMES A VON DER HEYDT
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AGNES BERGEN, Administratrix of the Estate of Thomas Karl Kauppinen; SHANNON LEE YOUHAS JOBE, Administratrix of the Estate of James E. Jobe; ROBERT KIDD; P.G. PAIR, Administrator of the Estate of Wilson Lee Pair; FRANK ROMERO, Personal Representative of the Estate of Ronnie Newton; THOMAS R. RYKER, Personal Representative of the Estate of Randall Ray Ryker; JAMES R. SANDIN, Personal Representative of the Estate of Vanessa N. Sandin; SALOME B. SMITH, Administratrix of the Estate of Charles Wayne Parlett; WILLARD GARY STALLINGS, Personal Representative of the Estate of Gary Todd Stallings; FLORA B. STIGALL and JOEL L. STIGALL, Individually and as Administrators of the Estate of Clifford S. Stigall, WALLACE R. THOMAS; ROBERT O. WASHBURN and BLANCE WASHBURN, d/b/a Marine Transportation,

Plaintiffs/Appellees,

vs.

F/V ST. PATRICK; ST. PATRICK, INC., DANIEL WHORTON; LEROY WHORTON; and WILLIAM WILSON,

Defendants/Appellants.

No. 86-3900

D.C. No. A-82-170-CV

OPINION

Argued and Submitted
March 5, 1987 - Seattle, Washington

Filed May 7, 1987

Before: Alfred T. Goodwin, Mary M. Schroeder and Jerome Farris, Circuit Judges

Opinion by Judge Farris

Appeal from the United States District Court for the District of Alaska
James A. von der Heydt,
District Judge, Presiding

SUMMARY

Admiralty

Appeal from a district court's decision in a case arising from the abandonment of a ship. Affirmed in part, reversed in part.

The appellants are three men who formed a Virginia corporation to purchase and outfit the fishing vessel ST. PATRICK for scallop fishing in Alaska. The master and mate hired did not have required licenses to sail outside territorial waters, and did not fill out license applications given them by the owners, who allowed the boat to go fishing anyway.

During the absence of the master, the boat's mate took the vessel out 13 miles from the shore, when a large wave rolled the boat on its side, forcing the crew to abandon ship. Ten of the crew eventually died from the cold. Two survived but were injured. The district court found the owners liable for negligence and for unseaworthiness. It found that they were guilty of gross, willful and wanton misconduct in failing to provide a capable master and mate, and awarded punitive damages as well as damages for pre-death pain and suffering, and a separate sum representing damages for loss of support, services and inheritance to the estates of those crew members who died in the accident. To the two survivors, the court awarded punitive damages, and other damages.

[1] Only pecuniary damages are available under the Jones Act or the Death on the High Seas Act (DOHSA). [2] At issue is whether

punitive damages available under the general maritime law may supplement the remedies available under DOHSA or the Jones Act. [3] The DOHSA applies when the death is caused by a wrongful act, neglect or default occurring on the high seas, defined as the site of an accident, not the site of the wrongful act. [4] Where DOHSA applies, its pecuniary remedies cannot be supplemented by nonpecuniary damages available under the general maritime law. [5] The plaintiffs argue that DOHSA is a remedial statute, and that punitive damages fill a gap left by Congress in this area. Although punitive damages have nothing to do with losses suffered, but are for punishment and deterrence, it is clear Congress intended DOHSA to preempt anything but pecuniary damages where DOHSA applies. [6] When an action under DOHSA is joined with a Jones Act action, neither statutory scheme may be supplemented by the general maritime law or by state law.

[7] In the case of the two survivors, the court's factual findings are not sufficient to support its punitive damage awards under general maritime law. Punitive damages can be granted where a shipowner has willfully violated the duty to furnish and maintain a seaworthy vessel. [8] But while it was negligence per se for the St. Patrick to sail on the high seas without properly licensed officers, more was required to prove willful conduct justifying punitive damages. The award of punitive damages to the two survivors was clearly erroneous.

[9] Because DOHSA preempts state wrongful death law, claimants are entitled only to the pecuniary damages for loss of support available under DOHSA. [10] The court made specific findings of dependency as to the wife and child of one decedent and the quadriplegic mother of another, but as to the parents of the other decedents no evidence of dependency was introduced. The findings of

dependency and services for these other parents were therefore clearly erroneous. [11] The awards to parents for loss of inheritance similarly find no support in the record.

[12] Although a district court may admit evidence of the effect of taxation in calculating damages based on future earnings, the owners did not raise this issue at trial. [13] There was no clear error in the court's calculation of a seaman's future earnings as an Alaska scallop fisherman despite testimony he had planned to return to Virginia. [14] Evidence supports the court's conclusion that the owners should be held personally responsible. [15] Any error in admitting the testimony of the captain of another vessel on a subject already ruled inadmissible was harmless and not prejudicial. [16] The court did not abuse its discretion in admitting certain earnings records of the other vessel. [17] The damage award is modified to reflect this opinion.

COUNSEL

Gerald W. Markham, Kodiak, Alaska, and James J. Rhodes, Anchorage, Alaska, for Plaintiffs-Appellees

Richard A. Nielson, Jr., Anchorage, Alaska, for Defendants-Appellants.

OPINION

FARRIS, Circuit Judge:

BACKGROUND

In October 1980, Daniel Whorton, Leroy Whorton and a third investor formed a Virginia corporation to purchase and outfit the fishing vessel St. Patrick for scallop fishing in Alaska. William Wilson purchased the third investor's 50% share in the enterprise in 1981.

The master and mate hired for the St. Patrick had considerable experience in fishing the North Atlantic. In September 1981, after an informal Coast Guard inspection of the boat in Anchorage, the owners were informed the officers had to be licensed by the Coast Guard to sail outside territorial waters.

The owners gave license applications to the vessel's officers, but the forms were never completed. The owners allowed the boat to go scallop fishing anyway. Two fishing operations were successfully completed in October and November 1981.

In late November, the boat's master made a temporary, unexpected departure, and the mate became acting master. The owners, aware of the master's absence and that the mate remained unlicensed, allowed the boat to continue fishing outside territorial waters. A storm arose while the St. Patrick was fishing 13 miles from shore. In heavy seas, the acting master kept the boat broadside to the waves despite suggestsions from the crew that this was dangerous. A large wave rolled the boat on its side, causing considerable flooding and damage. The acting master ordered the crew to abandon ship. Ten of the crew including the acting mate eventually died from the cold. Two survived, but were badly

injured and emotionally scarred. The boat was later found floating near the point of its abandonment.

The district court found the owners liable for negligence and for unseaworthiness. It found that the owners were guilty of "gross, willful and wanton misconduct" in failing to provide a competent, licensed master and mate for the St. Patrick. It awarded punitive damages as well as damages for pre-death pain and suffering, and a separate sum representing damages for loss of support, services, and inheritance to the estates of those crew members who died in the accident. As an alternative to the single sum for loss of support, services and inheritance, the court gave a figure for loss of services alone. "[i]n the event that it is subsequently determined on any appeal that only a loss of services is recoverable." To the two surviving crew members, the court awarded punitive damages, and damages for pain and suffering,

emotional trauma, disability, and loss of future earnings. The owners do not contest liability, nor do they appeal the awards for pre-death pain and suffering under the Jones Act. They appeal the awards of punitive damages, the award for support, services, and inheritance as to all decedents but James Jobe, and the size of the awards to the two survivors.

DISCUSSION

1. PUNITIVE DAMAGES

The trial court concluded as a matter of law that punitive damages were available under the general maritime law to the two survivors and to the estates of the nine decedents. Based on its factual finding that the owners' negligence had been "wanton, willful and intentional", the trial court awarded punitive damages to all plaintiffs. We review de novo the legal conclusion that punitive damages are available. United States ex rel Morgan & Son Earth Moving, Inc. v. Timberland Paving &

Const. Co., 745 F.2d. 595, 599 (9th Cir., 1984). We review for clear error the trial court's factual findings in support of an award of damages. Id.

[1] Only pecuniary damages are available under the Jones Act, 46 U.S.C. §688, and under the Death on the High Seas Act, 46 U.S.C. §762; see also, Kopscynski v. The Jacqueline, 742 F.2d. 555, 561 (9th Cir., 1984) (Jones Act), cert. denied. 471 U.S. 1136 (1985); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 (1978) (DOHSA); Nygaard v. Peter Pan Seafoods Inc., 701 F.2d. 77, 79 (9th Cir. 1983) (DOHSA). Punitive damages are non-pecuniary damages unavailable under the Jones Act. Kopczynski, 742 F.2d. at 561. Punitive damages are therefore also unavailable under DOHSA.

[2] The issue on appeal, however, is whether punitive damages available under the general maritime law may supplement the remedies available under DOHSA or the Jones

Act. [1] In analyzing the availability of punitive damages, the court did not distinguish between the survivors' actions - which included claims under the Jones Act and the general maritime law - and the decedents' actions - which included claims under the Jones Act, the Death on the High Seas Act, and the general maritime law. The court also

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[1] Whether or when punitive damages are available under the general maritime law is not entirely clear. In a maritime action that included no Jones Act claims, we held that punitive damages were available. Protectus Alpha Navigation Co. Ltd v. North Pacific Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985). Only the Fifth Circuit has held that punitive damages are available when an unseaworthiness claim is joined with a Jones Act claim. Complaint of Merry Shipping, Inc. 650 F.2d 622, 624-27 (5th Cir. 1981). Other circuits have rejected punitive damages in actions for unseaworthiness. See Complaint of Cambria S.S. Co., 505 F.2d. 517, 523, n. 11 (6th Cir., 1974), cert. denied, 420 U.S. 975 (1975); In Re. Marine Sulphur Queen, 460 F.2d. 89, 105 (2d Cir.) cert. denied, 409 U.S. 982 (1972); see also, Note, Punitive Damages in Admiralty. 18 Hastings L.J. 995 (1967) (punitive damages not then available in an unseaworthiness action).

failed to clarify whether DOHSA applied to the decedents. To review the trial court's award of punitive damages we must first determine which statute was being supplemented by which punitive damage awards.

A. Punitive Damages for the Decedents

The threshold question is whether the Death on the High Seas Act applies at all. The trial court's findings leave this in doubt. Although the trial court stated generally that its jurisdiction arose under DOHSA, as well as under the Jones Act and general maritime law, it did not indicate how DOHSA applied. It concluded that personal injury and death resulted from the operation of the St. Patrick on the high seas. But it also found that most of the decedents died after drifting back within territorial waters and that negligence originating onshore and within territorial waters contributed to the accident. Plaintiffs cite these findings in support of their contention that DOHSA was

not the basis for the court's damage awards. We reject this argument.

[3] The Death on the High Seas Act applies "[w]henever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas". 46 U.S.C. §761. This provision has been held to refer to the site of an accident on the high seas, not to where death actually occurs or where the wrongful act causing the accident may have originated. Lacey v. L.W. Wiggins Airways, Inc., 95 F.Supp. 916, 918 (D. Mass. 1951); accord Sea-Lane Services, Inc. v. Gaudet, 414 U.S. 573, 599-600 & n. 5 (1974) (Powell, J., dissenting on other grounds). It is therefore irrelevant that some of the St. Patrick's crew may have died in territorial waters. See Touhey v. Ross-Loos Medical Group, 111 Cal. App. 3d 958, 168 Cal. Rptr. 910 (Cal. Ct. App. 1980) (applying DOHSA where decedent was injured aboard ship on the high seas, but died of his injuries more than a year

later in a hospital onshore or within territorial waters. See Chute v. United States, 466 F.Supp. 61, 64 (D. Mass. 1978); Wilson v. Trans-Ocean Airlines, 121 F.Supp. 85, 92 (N.D. Cal. 1954). DOHSA applies to plaintiffs' suits because the St. Patrick's accident causing death occurred on the high seas.

[4] Where DOHSA applies, its pecuniary remedies cannot be supplemented by non-pecuniary damages available under the general maritime law. Mobil Oil Corp. v. Higgenbotham, 436 U.S. at 624-25 (barring damages for loss of society under the general maritime law). Nor can DOHSA be supplemented by non-pecuniary damages available under state law. Offshore Logistics, Inc. v. Tallentire, 106 S.Ct. 2485, 2498 (1986), (barring damages for loss of society under state law). The Supreme Court based these holdings on its view that:

> [t]he Death on the High Seas Act... announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, con-

> tributory negligence, survivial, and damages... The Act does not address every issue of wrongful-death law... but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless.

Higginbotham, 436 U.S. at 625.

[5] Plaintiffs argue that the unique purpose of punitive damages differentiates them from the type of non-pecuniary damages that Higginbotham barred. As the plaintiffs point out, the Supreme Court said that "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Id. Plaintiffs argue that DOHSA is a remedial statute and that punitive damages have nothing to do with losses suffered. Their purpose is punishment and deterrence. Memphis Community School Dist. v. Stachura, 106 S.Ct. 2537, 2542 n. 9 (1986); Protectus Alpha Navigation Co. Ltd. v. North Pacific Grain Growers, Inc., 767 F.2d 1379, 1385 (9th

Cir., 1985). Nonetheless, Higginbotham and Tallentire make it clear that Congress intended DOHSA to preempt anything but pecuniary damages where DOHSA applies. "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements." Higginbotham, 436 U.S. at 625. The pecuniary remedies available under DOHSA therefore cannot be supplemented by punitive damages under general maritime law.

[6] Plaintiffs contend that if punitive damages under the general maritime law cannot supplement DOHSA remedies, then punitive damages can supplement the awards they received under the Jones Act for decedents' pain and suffering before death. [2] We reject this

[2] These awards are not contested by the owners and are clearly lawful. See Cook v. Ross Island Sand and Gravel Co., 626 F.2d. 746 748-49 (9th Cir., 1980).

argument. Since few deaths at sea are instantaneous, many DOHSA plaintiffs qualify for Jones Act remedies for pre-death pain and suffering. If all of those actions could be supplemented by the general maritime law, Higginbotham's preemption of maritime law would be nullified. We hold that where an action under DOHSA is joined with a Jones Act action, neither statutory scheme may be supplemented by the general maritime law or by state law.

B. Punitive Damages for the Survivors

[7] The trial court granted the two survivors punitive damages under the general maritime law. The owners challenge the factual rather than the legal basis for those awards. We review for clear error the trial court's factual findings in support of a punitive damages award. United States ex. rel Morgan & Son Earth Moving, Inc. v. Timberland Paving & Const. Co., 745 F.2d 595, 599 (9th Cir., 1984.

The trial court's factual findings are not sufficient to support its punitive damage awards to the two survivors. If lawfully available in an unseaworthiness action, punitive damages could be granted where "a shipowner has willfully violated the duty to furnish and maintain a seaworthy vessel". Complaint of Merry Shipping, Inc., 650 F.2d 622, 625 (5th Cir., 1981). [3] The trial court found such willful conduct in the owners' "disregard" of the statutory requirement that the officers of the St. Patrick be licensed for operations on the high seas. See, 46 U.S.C. §224(a).

[3] Because the factual basis for the awards is clearly erroneous, we need not resolve the legal issue of the availability of punitive damages. To affirm the awards of punitive damages, of course, we would have had to review the owners' concession that there is a legal basis for the awards. "[W]e are not bound by a party's erroneous view of the law". Avila v. INS 731 F.2d 616, 620 (9th Cir., 1984), (quoting Flamingo Resort Inc. v. United States, 664 F.2d 1387, 1391 n. 5 (9th Cir.) cert denied, 459 US 1036 (1982). We have thus far not followed the Fifth Circuit in permitting punitive damages under the general maritime law where, as here, an unseaworthiness action is joined to an action under the Jones Act. See Complaint of Merry Shipping, 650

[8] As the trial court found, it was negligence per se for the St. Patrick to sail on the high seas without properly licensed officers. The record supports the trial court's findings that the owners knew that the ship was operating in violation of the licensing requirement. It also reflects that the owners knew that the officers had obtained licensing forms. The trial court did not reject this evidence. The court could properly conclude that the lack of licenses proved negligence, but more was required to prove "willful" conduct justifying punitive damages. Nothing more was shown. We are therefore compelled to conclude that the trial court's findings in support of its award of punitive damages to the two survivors are clearly erroneous.

F.2d at 624-27. As the trial court correctly observed, that issue is left open by our decision in Kopczynski, 742 F.2d at 560.

2. DAMAGES FOR LOSS OF SERVICES, SUPPORT, AND INHERITANCE

The trial court awarded damages for loss of services, support, and inheritance to the wife and child of James Jobe, the only married decedent. To the parents of the other decedents, the court awarded damages for loss of service, support, and inheritance, with alternative, smaller awards in case only loss of services was found to be recoverable. The court found that Jobe's wife and child were dependent on him and that "the named parents of the other deceased... were dependent upon their children for services and future support and are entitled to the pecuniary value thereof." The availability of damages under a statute is a legal question that we review de novo. United States ex rel Morgan & Son, 745 F.2d at 599. We review for clear error the trial court's factual findings in support of an award of lawfully recoverable damages. Id.

[9] Because DOHSA preempts state wrongful death law, Offshore Logistics, Inc. v. Tallentire, 106 S.Ct. 2485, 2500 (1986), claimants are entitled only to the pecuniary damages available under DOHSA. Loss of support, services, and inheritance are pecuniary damages available under DOHSA. Sea-Land Services Inc. v. Gaudet, 414 U.S. at 584-86 (1974) (loss of support and services); Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77, 80 (9th Cir., 1983) (loss of inheritance). Any damage award must be proved and be reasonably certain. Harmsen v. Smith, 693 F.2d 932, 945 (9th Cir. 1982) cert. denied, 464 U.S. 822 (1983). "Although damages need not be proved to a mathematical certainty, 'sufficient facts must be introduced so that a court can arrive at an intelligent estimate without speculation or conjecture'." Id., (quoting Rochez Brothers v. Rhoades, 527 F.2d 891, 895 (3rd Cir. 1975)). Recovery under DOHSA for loss

of support "includes all the financial contributions that the decedent would have made to his dependents had he lived". Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 584-85 (1974). Therefore, as the trial court recognized, recovery for loss of support requires some showing of dependence on the deceased or an expectation of support. Damages for loss of services require proof that such services were expected and likely to be provided, but for the wrongful death. See id. at 585. Damages for loss of inheritance require proof that the decedent, but for his death, would probably have accumlated property that the wrongful death beneficiary would have inherited. Nygaard v. Peter Pan Seafoods, 701 F.2d at 80. The factual findings attesting to all such proof must be comprehensive enough to provide a basis of decision and must be fairly supported by the record. Clady v. County of Los Angeles, 770 F.2d 1421, 1433 (9th Cir., 1985), cert. denied, 106 S.Ct. 1516

(1986). The record fairly supports only part of the trial court's awards for loss of support, services, and inheritance.

[10] The court made specific findings of dependency as to the wife and child of James Jobe and as to the quadriplegic mother and totally disabled father of Clifford Stigall. As to the parents of the other decednts, the court made a more general finding that they "were dependent upon their children for services and future support and are entitled to the pecuniary value thereof". While there is evidence from which the court could have made findings regarding parental dependency of the Stigalls, no evidence was introduced from which the trial court could find that any of the other parents were dependent on their deceased children or expected to receive significant services from them. We must therefore hold that the other findings of dependency and services are clearly erroneous. We recognize the parents' tragic loss of love and

companionship from their deceased children. But loss of society is nonpecuniary and therefore not recoverable under DOHSA. Higginbotham, 436 U.S. at 624-25.

[11] Similarly, the court's awards to parents for loss of inheritance find no support in the record. In the ordinary course, it is improbable that parents will inherit from children. See Thompson v. Offshore Co., 440 F.Supp. 752, 763 (S.D. Tex. 1977). The trial court made no factual findings that overcome this improbability. Speculation cannot support an award for loss of inheritance. Nygaard v. Peter Pan Seafoods, 701 F.2d at 80. The same inference does not apply to James Jobe, who had a wife and child. The record therefore fails to provide a basis for finding clear error in the trial court's award of damages for loss of inheritance to Jobe's wife and child.

3. TAXATION ON FUTURE EARNINGS AND INHERITANCE

The owners contend that any damages for loss of support, services, or inheritance, which are based on caluclations of future earnings, must be reduced to account for taxation of those earnings. As with other factual aspects of damage awards, we review for clear error. United States ex rel Morgan & Son, 745 F.2d at 599.

[12] We have held that a district court may admit evidence of the effect of taxation in calculating damages based on future earnings. Rudelson v. United States, 602 F.2d. 1326, 1331 (9th Cir., 1979); Sauers v. Alaska Barge, 600 F.2d. 238, 247 (9th Cir., 1979). We have specifically rejected a rule requiring the admission of such evidence. Burlington Northern, Inc. v. Boxberger, 529 F.2d 284, 294 (9th Cir., 1975). Moreover the owners did not raise this issue at trial. Other circuits have refused to consider this issue

on appeal where the appellant did not seek to introduce evidence relating to taxation at trial. See Deakle v. John E. Graham & Sons, 756 F.2d 821, 830-31 (11th Cir., 1985); Fanetti v. Hellenic Lines Ltd., 678 F.2d 424, 432 (2d Cir., 1982); cert. denied, 463 U.S. 1206 (1983). We therefore find no clear error in the calculations of future earnings that are the basis for the damage award to the family of James Jobe.

4. FUTURE EARNINGS OF DECEDENT PLANNING TO RETURN TO VIRGINIA

The district court based its damage awards on estimates of future earnings for Alaska scallop fishermen. The owners contend that the award for James Jobe must be adjusted because of testimony at trial that he had intended to return to Virginia to work in another type of fishing. An award of damages will be overturned only if it is clearly unsupported by the evidence. Chalmers v. City of Los Angeles, 762 F.2d 753, 760 (9th Cir. 1985).

[13] The record established that Jobe had a wife and child in Virginia, and there was testimony at trial that he planned to return there rather than remain in Alaska. Scallop fishing in Alaska was, however, his job at the time of his death. The trial court could have properly concluded that any other evidence about Jobe's future plans was too speculative to substantiate a reduction in the award. We find no clear error in the court's calculation of Jobe's future earnings as an Alaska scallop fisherman.

5. PERSONAL LIABILITY OF THE OWNERS

The trial court held the owners personally liable on two alternative grounds: (1), they were liable as shareholders because the St. Patrick corporation was an "artifice and a sham", and (2) they were liable as corporate officers because they had participated in a tort committed by the corporation. Because we find no clear error in the trial court's

disregard of the St. Patrick's corporate entity, we need not reach the issue of the owners' liability as officers participating in corporate torts.

In deciding whether to disregard the corporate entity and hold shareholders personally liable for debts of the corporation, courts consider three factors: the amount of respect given to the separate identity of the corporation by its shareholders, the degree of injustice visited on the litigants by recognition of the corporate entity, and fraudulent intent in the formation of the corporation. Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc., 736 F.2d 516, 524 (9th Cir. 1984); Seymour v. Hull & Moreland Engineering, 605 F.2d 1105, 1111 (9th Cir., 1979). We review for clear error the factual findings that underlay the court's piercing of the corporate veil. Laborers Clean-Up, 736

F.2d at 523. [4]

[14] The district court found that the level of capitalization of the corporation was sufficiently low to constitute fraud. See Laborers Clean-Up, 736 F.2d at 524. Recognizing the corporate form would work an injustice, the court found, because "[y]oung seamen employed on large fishing vessels such as the St. Patrick have a right to expect (with their limited knowledge of corporate laws) that the operation is at least sufficiently capitalized to insure compliance with the basic laws for their safety such as the Officer Competency Act. 46 U.S.C. §224(a)." The record reflects intermingling of personal and corporate funds, the lack of a company bank account, the absence of organizational minutes,

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[4] The owners argue that the district court erred as a matter of law by failing to make any findings on the issue of fraudulent intent in the formation of St. Patrick, Inc. But the court's findings that "the corporation was an artifice and a sham designed to execute illegitimate purposes" goes to fraudulent intent.

the failure to file corporate tax returns, and the failure to pay dividends. All of this supports the court's conclusion that the corporation's activities "in reality were those of William Wilson, J. Leroy Whorton, and Daniel Whorton."

6. EVIDENTIARY MATTERS

A. Testimony of Captain Burke

The owners dispute the admission of certain testimony by Phillip Burke, captain of the Pursuit, another scallop boat in Alaska. The trial court has broad discretion to admit expert testimony, and we will sustain the court's action unless it is "manifestly erroneous". Taylor v. Burlington Northern R. Co., 787 F.2d. 1309, 1315 (9th Cir., 1986).

After consideration voir dire, the trial court ruled that Captain Burke's testimony as to earnings of other scallop boats was incompetent as based on hearsay. It was ordered

disregarded. [5] On cross-examination, however, counsel for the owners asked whether the earnings of Captain Burke's boat were higher than other Alaska scallop boats. On redirect, plaintiffs' attorney asked Burke whether the earnings of his boat were average or above average for the industry. Owner's counsel objected that the court had already ruled that such testimony by Captain Burke was incompetent. The trial court ruled that the testimony could stand on redirect because owner's counsel had elicited testimony on the same subject in his cross-examination.

[15] The owners argue on appeal that

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[5] It would not have been an abuse of discretion for the trial court to admit the evidence and then permit an inquiry on cross-examination as to the reliability of the hearsay upon which Captain Burke relied in forming his opinion on the earnings of other fishing boats. "The relative weakness or strength of the factual underpinnings of the expert's opinion goes to weight and credibility, rather than admissibility." Taenzler v. Burlington Northern, 608 F.2d 796, 798 n. 3 (8th Cir., 1979). "The weakness in the underpinnings of [expert] opinions may be developed upon cross-examination and such weakness goes to the weight and credibility of the testimony." Polk v. Ford Motor Co., 529 F.2d 259, 271 (8th Cir.) cert. denied, 426 US 907 (1976).

counsel's questions on cross-examination were voir dire, probing the basis for Captain Burke's expert testimony. But the court had already ruled that Burke's testimony as to the earnings of other boats would be disregarded, so there was no need for further voir dire on that issue. Where counsel elicits inadmissible evidence in cross-examination, he waives the right to object to admission of that evidence on redirect. Burgess v. Premier Corp. 727 F.2d 826, 834 (9th Cir., 1984); see also, 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 103(02), at 14-16 & n. 67 (1986). We need not decide whether this "opening the door" principle applies where, as here, the court had already ruled that certain evidence was inadmissible. If there was error, it was harmless. There is no question that Captain Burke was competent to testify as to the earnings of his own ship. The record includes other evidence besides that of Captain Burke

to support the trial court's finding that earnings of the Pursuit were probative of expected earnings of the St. Patrick. The two boats were of similar size and design, larger and more powerful than other Alaska scallop boats. Captain Burke's brief answers to questions on redirect were not prejudicial.

B. Earnings Records of the Pursuit

The owners also challenge the admission at trial of earnings records for the Pursuit. They contend that the records were not properly authenticated. An independent bookkeeper prepared the records, but she was not present at trial for examination and the expert witness did not have an independent recollection of them. The owners claim that this violates the hearsay rule. We review the trial court's evidentiary ruling for abuse of discretion. Kisor v. Johns-Manville Corp., 783 F.2d 1337, 1340 (9th Cir., 1986).

[16] The business records exception to

the hearsay rule allows the admission of systematically entered records without the necessity of locating and calling as a witness the individual who kept them. Fed. R. Evid. 803(6); see e.g., City of Phoenix v. Com/Systems, Inc., 706 F.2d 1033, 1037-38 (9th Cir., 1983). The record reflects an adequate foundation for admitting the Pursuit's earnings records under rule 803(6). We find no abuse of discretion in the admission of those records.

REVISED AWARDS

[17] Consistent with our review, we modify the trial court's damage awards to the plaintiffs as follows:

A. Wallace Thomas is entitled to recover:

a. For the terror of the accident, abandoning ship at sea, intense pain and cold, the emotional trauma of watching his shipmates die, and fear and anxiety prior to rescue, $200,000.00

b. For severe long term debilitating physical, mental and emotional damage, including severe depression

him unable to cope with his daily life, causing him irrational and unfounded feeling of guilt $225,000.00

TOTAL: $425,000.00

B. James Jobe's estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

b. Lost support, services and loss of inheritance to the wife and child of James Jobe $2,119,992.00

c. Loss of nurture ot his minor child $51,000.00

TOTAL: $2,370,000.00

C. Vanessa Sandin's estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

TOTAL: $200,000.00

D. Gary Todd Stalling's estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

TOTAL: $200,000.00

E. Thomas Kauppinen's estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

TOTAL: $200,000.00

F. Ronnie Lee Newton's estate is entitled to recover:

a. For conscious pre-death pain and suffering: $200,000.00

TOTAL: $200,000.00

G. Randy Ryker's estate is entitled to recover:

a. For conscious pre-death pain and suffering $200,000.00

TOTAL: $200,000.00

H. Charles Parlett's estate is entitled to recover:

a. For conscious pre-death pain and suffering: $200,000.00

TOTAL: $200,000.00

I. Wilson Pair's estate is entitled to recover:

a. For conscious pre-death pain and suffering: $200,000.00

TOTAL: $200,000.00

J. Clifford Stigall's estate is entitled to recover:

a. For conscious pre-death pain and suffering: $200,000.00

b. For loss of support and services to his parents $150,000.00

TOTAL: $350,000.00

K. Robert Kidd is entitled to recover:

a. Future foreseeable maintenance and cure $ 50,000.00

b. For the terror of the accident, abandoning ship at sea, intense pain, cold and the emotional trauma of seeing his friend Doc Stigall disappear $200,000.00

c. For pain and suffering from rescue to trial $100,000.00

d. Permanent disability of the loss of his feet and their deformity as testified to by Dr. Mills $150,000.00

e. Past and lost future income $2,255.837.00

f. Future pain from surgeries and hospitalization $100,000.00

TOTAL: $2,855,837.00

Each party shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AGNES BERGEN, et al., Plaintiffs/Appellees	No. 86-3900
vs.	D.C. No. A82-170 CV
F/V ST. PATRICK et. al. Defendants/Appellants	ORDER

Filed February 2, 1989

Before: Alfred T. Goodwin, Mary M. Schroeder and Jerome Farris, Circuit Judges

ORDER

The appellee's petition for rehearing of this case asked in part that we reconsider our reversal of the award of damages for parental loss of services. We stated in our opinion filed May 7, 1987, that there was no evidence in the record to support that award for any of appellees other than the Stigalls. Bergen v. F/V St. Patrick, 816 F.2d 1345, 1350 (9th Cir. 1987). We said:

> While there is evidence from which the court could have made findings regarding parental dependency of the Stigalls, no evidence was introduced from which the trial court could find that any of the other parents were dependent on their deceased children or expected to receive significant services from them. We must therefore hold that the other findings of dependency and services are clearly erroneous. 816 F.2d 1345, 1350 (9th Cir., 1987).

On rehearing, the appellees maintained, however, that certain deposition evidence had been considered by the district court and provided support for the findings of dependency and services with respect to the parents other than the Stigalls. Appellant disputed appellees' contention that the district court considered such depositions.

The record on appeal indicated that the district court may have considered deposition evidence in support of the claims, but was not clear on the point. We therefore granted a limited remand of the case in order to permit the district court to amplify its

amplify its findings with regard to dependency and services.

The district court has now done so, and on the basis of the district court's supplemental memoranda submitted by the parties, we conclude that the district court did consider the deposition testimony as evidence supporting its findings. The appellants' contentions in this appeal that the district court did not consider any such evidence are therefore incorrect.

Accordingly we grant the appellee's petition for rehearing in part and modify our original disposition. The award of damages for parental loss of support and services entered on behalf of each appellee is hereby affirmed.

The petition for rehearing is in all other respects denied.

The full court has been advised of the suggestion for rehearing en banc and no judge

of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

Except as provided in this order, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

DEATH ON THE HIGH SEAS ACT
46 U.S.C. §§ 761-767 (1982)

§ 761. Right of action; where and by whom brought.

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the Territories or dependencies of the United States, the personal Representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery.

The recovery in such suit shall be a fair and just compensation for the pecuniary loss

sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 763a. Limitations.

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commended within three years from the date the cause of action accrued.

§ 764. Rights of action given by laws of foreign countries.

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount

for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action.

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§ 766. Contributory negligence.

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and

reduce the recovery accordingly.

§ 767. Exceptions from operation of chapter.

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

APPENDIX G

JONES ACT
(46 U.S.C. § 688(a))

§ 688(a). Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative or such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the dis-

trict in which the defendant employer resides or in which his principal office is located.

APPENDIX H

FEDERAL EMPLOYERS LIABILITY ACT (FELA) SURVIVAL STATUTE (45 U.S.C. § 59)

§ 59. Survival of right of action of person injured.

Any right of action given by this act [45 USCS §§ 51 et seq.] to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband or children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

APPENDIX I

OFFICERS' COMPETENCY
CERTIFICATES CONVENTION, 1936
(46 U.S.C. § 224a)

§ 224a. Officers' Competency Certificates Convention, 1936

(1) The Officers' Competency Certificates Convention, 1936 International Labor Organization Draft Convention Numbered 53, "conerning the minimum requirement of professional capacity for masters and officers on board merchant ship", as ratified by the President on September 1, 1938, with understandings appended, and this section shall apply to all vessels, however propelled, navigating in the high seas, which are registered, enrolled and licensed, or licensed under the laws of the United States, whether permanently, temporarily, or provisionally, including yachts enrolled and licensed, or licensed, with the exception of -

(a) ships of war;

(b) Government vessels, or vessels in

the service of a public authority, which are not eneged in trade;

(c) wooden ships of primitive bhild, such dhows and junks;

(d) unrigged vessels;

e) all vessels of less than two hundred gross tons.

(2) All laws in effect on October 29, 1939, convering the issuance, duration, renewal, suspension, and revocation of licenses of masters, mates, chief engineers, and assistant engineers are made applicable to the issuance, duration, renewal, suspension, or revocation of licenses of masters, mates, chief engineers, and assistance engineers of all vessels to which the Officers' Competency Certificates Convention, 1936, and this section apply, to such extent and upon such conditions as may be required by the regulations of the Commandant of the Coast Guard: Provided, That examinations for licenses of masters, mates, chief engineers and assistant engineers of

fishing vessels, not subject to the inspection laws of the United States shall not be required to obtain a certificate from the United States Public Health Service based upon the subject of ship sanitation, and first aid.

(3) Any license issued (whether before, or on, or after, October 29, 1939,) to a master, mate, chief engineer, or assistant engineer of a vessel to which this section applies shall be deemed to be a certificate of competency for a master or skipper, navigating officer in charge of a watch, cheif engineer, or engineer in charge of a watch, respectively.

(4) No person shall be engaged to perform, or shall perform on board any vessel to which this section applies, the duties of master, mate, chief engineer, or assistant engineer unless he holds a license to perform such duties, issued in accordance with the provisions of subsection 2 of this section: Provided, That a license as master, mate, chief engineer or assistant engineer of vessels sub-

ject to this section may be issued without examination at any time prior to October 29, 1941, to any applicant who has had sufficient practical experience in the position for which he applies to be licensed and has no record of any serious technical error against him: Provided, further, That no person to whom a license as master, mate, chief engineer, or assistant engineer is issued without examination may serve under authority of that license as master, mate, chief engineer, or assistant engineer on any vessel subject to the inspection laws of the United States.

(5) It shall be unlawful to engage or employ any person or for any person to serve as a master, mate, or engineer on any such vessel who is not licensed by the Coast Guard; and anyone violating this section shall be liable to a penalty of $100 for each offense.

(6) If any collector of customs has reason to believe, on complaint or otherwise, that a vessel subject to this section and to the

regulations established thereunder is about to proceed to the high seas from a port in the United States or any Territory over which the United States exercises jurisdiction, except the Panama Canal Zone, in violation of any provision of this section or of any provision of the Officers' Competency Certificates Convention, 1936, he may, by written order served on the master or officer in charge of such vessel, detain her until such time as this section shall have been complied with. Clearance shall be refused to any vessel which shall have been ordered detained. If the vessel be ordered detained the master may, within five days, appeal to the Commandant of the Coast Guard, who may, after investigation, affirm, set aside, or modify the order of the collector.

(7) Foreign vessels to which the Officers' Competency Certificates Convention, 1936, applies shall be subject to such inspection, within the jurisdiction of the United States, except the Panama Canal Zone, as may be neces-

sary to determine that there has been a compliance with the terms of the convention, and in case of any breach of the provisions of the convention by such vessel the collector of customs may, by written order served on the master or officer in charge of such vessel, detain her and refuse clearance to her until such time as the convention shall have been complied with; the collector shall also immediately notify the counsel of the country in which the vessel is registered. If the vessel be ordered detained the master may, within five days, appeal to the Commandant of the Coast Guard, who may, after investigation, affirm, set aside, or modify the order of the collector.

(8) No provision of the Officers' Competency Certificates Convention, 1936, or of this section, shall apply to any vessel of the United States of less than two hundred gross tons, nor shall any provision of that convention or this section be deemed to alter, amend, or repeal any statute of the United States in effect on

October 29, 1939, with regard to any such vessel.

(9) The Commandant of the Coast Guard shall establish such regulations as may be necessary to secure the enforcement of the provisions of this section by any officer of the United States authorized to enforce the navigation or inspection laws of the United States.

(10) The Commandant of the Coast Guard or any officer of the Coast Guard authorized by the Commandant of the Coast Guard, may, upon application therefor, remit or mitigate any fine or penalty incurred under this section or any regulation thereunder.

(11) No provision of the Officers' Competency Certificates Convention, 1936, nor of this section, shall apply to any vessel however propelled, navigating on the Great Lakes.

(12) Where used in this section -

(a) the term "high seas" means all waters outside the line dividing the inland waters from the high seas, as defined in

section 151 of Title 33;

(b) the term "unrigged vessel" means any vessel that is not self-propelled.

(13) Nothing contained in the Officers' Competency Certificates Convention, 1936, nor in this section, shall be deemed to extend and provision of section 673 of this title, or to alter, modify, or repeal any statute of the United States in effect on October 29, 1939, except as hereinbefore provided.

(14) This section shall become effective on October 29, 1939.

(15) There are authorized to be appropriate such sums as may be necessary to carry out the provisions of this section.

APPENDIX J

ALASKA SURVIVAL STATUTE

§ AS 09.55.570. All causes of action survive.

All causes of action by one person against another, whether arising on contract or otherwise, except those involving defamation of character, survive to the personal representative of the former and against the personal representative of the latter, but this shall not be construed so as to abate an action for a wrong where any party has died after the verdict or to defeat or prejudice the right of action given by AS 09.15.101. The personal representatives may maintain an action thereon against the party against whom the cause of action accrued, or, after the party's death, against the personal representatives of the party.

APPENDIX K

ALASKA'S STATUTES APPLYING
ALASKA'S LAWS TO THE HIGH SEAS AND
TO ITS CITIZENS ON THE HIGH SEAS

AS 44.03.010 - .040

§ AS 44.03.010. Offshore water and land.

The jurisdiction of the state extends to water offshore from the coast of the state as follows:

(1) the marginal sea to its outermost limits as those limits are from time to time defined or recognized by the United States of America by international treaty or otherwise;

(2) the high seas to the extent that jurisdiction is claimed by the United States of America, or to the extent recognized by the usages and customs of international law or by agreement to which the United States of America or the state is a party;

(3) submerged land including the subsurface of submerged land, lying under the water mentioned in this section.

§ AS 44.03.020. Ownership of water and submerged land.

The ownership of the water and submerged land described in AS 44.03.010 is in the state unless ownership of a parcel or area is held by a person or entity by a valid and effective instrument of conveyance or by operation of law.

§ AS 44.03.030. Construction of chapter.

This chapter does not limit or restrict:

(1) the jurisdiction of the state over a person or subject inside or outside the state which is exercisable by reason of citizenship, residence or another reason recognized by law;

(2) jurisdiction over or ownership of other water or land under other water inside or forming part of the boundaries of the state;

(3) legislative jurisdiction of the United States over an area to which legislative jurisdiction is ceded by the state and which remains in the ownership of the United States.

§ AS 44.03.040. Reconciliation with other statutes.

This chapter does not alter the geographic area to which a statute of the state applies if the statute specifies the area precisely in miles or by another numerical designation of distance or position. Nothing in the statute or in this chapter is a waiver or relinquishment of jurisdiction over or ownership by the state of an area to which jurisdiction or ownership extends under another provision or rule of law.

Supreme Court, U.S.
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No. 88-1762

In The

Supreme Court for the United States

October Term, 1988

ROBERT KIDD, et al,
Petitioners,

v.

F/V ST. PATRICK, et al.,
Respondents.

AGNES BERGEN, et al.,
Petitioners,

v.

F/V ST. PATRICK, et al.,
Respondents.

RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. ARE PUNITIVE DAMAGES AVAILABLE FOR A WRONGFUL DEATH CLAIM UNDER GENERAL FEDERAL MARITIME LAW WHEN JOINED WITH AN ACTION UNDER DOHSA AND THE JONES ACT?

II. ARE PUNITIVE DAMAGES AVAILABLE FOR A SURVIVAL CLAIM FOR PRE-DEATH PAIN AND SUFFERING WHEN JOINED WITH A WRONGFUL DEATH CLAIM UNDER DOHSA AND THE JONES ACT?

III. DID THE NINTH CIRCUIT ERR IN HOLDING THAT THE TRIAL COURT'S FACTUAL FINDINGS WERE INSUFFICIENT TO SUPPORT AN AWARD OF PUNITIVE DAMAGES TO THE SURVIVING CREW MEMBERS?

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STATEMENT OF THE CASE

The opinion in *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1346-47 (9th Cir. 1987), contains an outline of the facts of this case which is sufficient for discussion of the legal issues presented in Questions I and II. The facts relevant to Question III will be discussed as part of that argument.

ARGUMENT

Introduction

The availability of punitive damages in wrongful death and survival actions arising in admiralty is in some respects a developing area of the law and has generated a great deal of critical commentary. It is among the questions left open by this court's decision in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970), recognizing a common law cause of action for wrongful death under the common law of admiralty. Of particular interest has been the interaction of the general maritime law with the Death on the High Seas Act (DOHSA), 46 U.S.C. Sec. 761-768, the Jones Act, 46 U.S.C. Sec. 688, and the law of the various states.

The reported decisions cannot all be reconciled into a coherent view of the law, and respondents will not attempt to do so. It *is* possible, however, to reconcile *Bergen* with the decisions of this court, as a necessary and logical successor to those decisions. Indeed, plaintiffs concede that their position is weak so long as those decisions stand. While some inconsistency in the law remains, it is of the sort which needs to be addressed by Congress, not this court.

Statutory Overview

There are four possible sources of law which may be examined in determining whether punitive damages are available in this case. First, there is the Death on the High Seas Act (DOHSA), 46 U.S.C. Sec. 761-768, which provides a cause of action for the death of any person occurring on the high seas beyond three miles from the shore of any state. 46 U.S.C. Sec. 761. Liability in a DOHSA suit may be based upon negligence, unseaworthiness, or strict liability. 46 U.S.C. Sec. 761; *Moragne,* 398 U.S. at 399-401, 90 S. Ct. at 1787-88. DOHSA explicitly provides that damages are limited to pecuniary losses. 46 U.S.C. Sec. 762. It does not include a survival statute to allow recovery of pre-death pain and suffering by the decedent.

The Jones Act, 46 U.S.C. Sec. 688, enacted in 1920 at the same time as DOHSA, extends to seamen the protections of the

Federal Employer's Liability Act (FELA), 45 U.S.C. Sec. 51-59. It provides both a remedy for wrongful death and a survival action. 45 U.S.C. Sec. 51, Sec. 59. It applies both in territorial waters and on the high seas. Liability depends on proving negligence, and there is no Jones Act remedy for unseaworthiness. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 154, 85 S. Ct. 308, 313, 13 L.Ed.2d 199 (1964). Where the wrongful death provisions of the Jones Act are applicable, they will preempt the same cause of action under the general maritime law. *Id.* at 155, 85 S. Ct. at 313-14. Damages for wrongful death under the Jones Act are not explicitly limited to pecuniary losses, but such a limitation has been uniformly accepted by the courts. *See, e.g., Ivy v. Security Barge Lines, Inc.*, 606 F.2d 324, 328 (5th Cir. 1979) (*en banc*), *cert. denied* 446 U.S. 956, *rehearing denied* 448 U.S. 912 (1980); *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 79-80 (9th Cir. 1983). Whether damages are similarly limited in survival actions is an unsettled question.

The general maritime law provides a remedy for wrongful death based upon proof of unseaworthiness. *Moragne*, 398 U.S. at 410, 90 S. Ct. at 1792. The *Moragne* cause of action for wrongful death applies only in territorial waters, because the general maritime law is preempted by DOHSA in wrongful death actions upon the high seas. *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618, 625-26, 98 S. Ct. 2010, 2015, 56 L.Ed.2d 581 (1968) *rehearing denied* ____ U.S. ____, 99 S. Ct. 232. Although this court has not addressed the question, the lower courts have held that the general maritime law includes a survival action, allowing a decedent's estate to recover for pre-death pain and suffering. The few courts which have considered the question have held that punitive damages are available in wrongful death actions and survival actions under the general maritime law.

Finally, plaintiffs sometimes look to state law to provide supplemental remedies not available under federal law. Alaska has both a wrongful death statute, AS 09.55.580, and a survival statute, AS 09.55.570. In *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232, 106 S. Ct. 2485, 2498, 91 L.Ed.2d 174 (1986), this court held that where DOHSA applies, a wrongful death action may not be supplemented by non-pecuniary damages available under state law. *Tallentire* did not decide whether non-pecuniary damages available in survival actions would likewise be preempted by either DOHSA or the Jones Act.

I. ARE PUNITIVE DAMAGES AVAILABLE FOR A WRONGFUL DEATH CLAIM UNDER GENERAL FEDERAL MARITIME LAW WHEN JOINED WITH AN ACTION UNDER DOHSA AND THE JONES ACT?

Plaintiffs acknowledge that punitive damages for wrongful death claims are not allowable under DOHSA or the Jones Act, but they argue that general maritime law or state law may be used to supplement the federal statutory damages allowed. Yet *Bergen* was clearly correct in holding that where death occurs on the high seas, DOHSA provides the exclusive remedy for the negligence and unseaworthiness which caused the death, and that punitive damages are not recoverable under any theory where DOHSA applies.[1] This should be a settled question, and does not merit a grant of certiorari.

Moragne did not answer whether the general maritime law may include punitive damages for wrongful death occurring as a result of unseaworthiness, although several circuit court cases have answered this question in the affirmative. *See, e.g., Evich v. Morris (Evich II),* 819 F.2d 256, 258-59 (9th Cir. 1987) *cert. denied* ____ U.S. ____, 108 S. Ct. 261; *Complaint of Merry Shipping, Inc.,* 650 F.2d 622, 626 (5th Cir. 1981). Whether these holdings are correct must be considered in light of *Higginbotham,* where this court stated that further development of the maritime common law should be guided primarily by DOHSA, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right. *Higginbotham,* 436 U.S. at 625; 98 S. Ct. at 2014. The field is full of inconsistent dicta and refusal to decide the question. *See* Waddell, *Punitive Damages in Admiralty,* 19 J. Mar. L. and Comm. 65, 69-73 (1988).

This debate need not be joined in this case. The law is clear that DOHSA is preemptive as it applies to wrongful death. It preempts both the state law of wrongful death and the general maritime law where Congress has spoken. *Tallentire,* 477 U.S. at 230, 232, 106 S. Ct. at 2497, 2500; *Higginbotham,* 436 U.S. at

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[1] Plaintiffs have rightly abandoned their argument that DOHSA does not apply to the decedents who came back within territorial waters before they died. The accident itself took place on the high seas, making DOHSA applicable by its terms. *See Bergen,* 816 F.2d at 1348.

625, 98 S. Ct. at 2015. While the legislative history of DOHSA is not as useful as it might possibly be, *see Tallentire,* 106 S. Ct. at 2496, it does indicate an intent to preempt state and maritime law on the question of damages. 46 U.S.C. Sec. 762. As this court said in *Higginbotham,*

> The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. The Act does not address every issue of wrongful death law, but when it does speak directly to a question, the courts are not free to "supplement" Congress' answers so thoroughly that the Act becomes meaningless . . . Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements.

Higginbotham, 436 U.S. at 626, 98 S. Ct. at 2015.

Plaintiffs' remedies under DOHSA are limited to pecuniary damages only. *Higginbotham,* 436 U.S. at 623, 98 S. Ct. at 2013; *see also* 46 U.S.C. Sec. 762. It cannot reasonably be disputed that punitive damages are non-pecuniary within the meaning of the statute.[2] *See Kopczynski v. The Jacqueline,* 742 F.2d 555, 561 (9th Cir. 1984), *cert. denied,* 471 U.S. 1136 (punitive damages are non-pecuniary within the meaning of the Jones Act); *Kozar v. Chesapeake & Ohio R. Co.,* 449 F.2d 1238, 1240-43 (6th Cir. 1971) (punitive damages are non-pecuniary within the meaning of the FELA); *see also Complaint of Merry Shipping,* 650 F.2d 622, 626 (5th Cir. 1981) (assuming without deciding that punitive damages are non-pecuniary within the meaning of the Jones Act). According to *Neal v. Barisich, Inc.,* 707 F. Supp. 862, 973 (E.D. La. 1989),

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[2] The plaintiffs appear to have abandoned their earlier argument that the real distinction to be made is not between pecuniary and non-pecuniary damages, but between actual damages (both pecuniary and non-pecuniary) and punitive damages. Plaintiffs contended below that since Congress spoke only to actual damages, a "gap" existed which could be filled with the general maritime law. This argument was quickly and correctly disposed of in *Bergen,* 816 F.2d at 1348-49.

there is no case which holds otherwise. Punitive damages are therefore unavailable to the plaintiffs on their wrongful death claims.[3]

No federal court has awarded punitive damages for a wrongful death claim under general maritime law where DOHSA also applies. After *Higginbotham,* none is likely to do so. There is no need to grant certiorari on this question.

II. ARE PUNITIVE DAMAGES AVAILABLE FOR A SURVIVAL CLAIM FOR PRE-DEATH PAIN AND SUFFERING WHEN JOINED WITH A WRONGFUL DEATH CLAIM UNDER DOHSA AND THE JONES ACT?

Unable to sustain the award as an adjunct to the wrongful death claim, plaintiffs argue that punitive damages can perhaps supplement the award for decedents' pre-death pain and suffering. Yet *Bergen* was correct in holding that where an action under DOHSA is joined with an action under the Jones Act, neither statutory scheme may be supplemented by the general maritime law or state law. *Bergen,* 816 F.2d at 1349.

A. *Punitive Damages Are Not Available for a Jones Act Survival Claim When Joined With a DOHSA Claim.*

Plaintiffs contend that although punitive damages are unavailable under the Jones Act in wrongful death actions, they may be recoverable for personal injuries in Jones Act survival actions on the high seas. This is admittedly an unsettled area of the law. *See* Annotation, *Recovery of Punitive Damages Under the Jones Act or Federal Employer's Liability Act,* 10 A.L.R.F. 511, 525-31 (1972). Three relatively recent Ninth Circuit decisions reflect the lack of uniformity in this area.

In *Cook v. Ross Island Sand & Gravel Co.,* 626 F.2d 746, 749 (9th Cir. 1980), the court stated that while the Jones Act arguably applies a pecuniary loss restriction to the losses of

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[3] A recent comment on the *Bergen* case has described the Ninth Circuit's reasoning as "beyond reproach." "Faced with a statute in which Congress clearly specified a remedy for 'pecuniary loss,' it would be difficult for the court to create an exception . . . Based on the weight of authority, the Ninth Circuit would have had difficulty reaching a different outcome." Note, *Bergen v. F/V St. Patrick: Higginbotham Prevails — No Punitive Damages under the Death on the High Seas Act,* 62 Tulane L. Rev. 1139, 1142 (1988).

decedent's beneficiary, it does not apply such a restriction to the injuries of decedent himself. *See* Sec. 59 of FELA: "[a]ny right of action given by this chapter to a person suffering injury shall survive to his or her personal representative." The court was swayed by the fact that this court has allowed plaintiffs to recover for pain and suffering, *Gillespie v. U.S. Steel Corp.,* 379 U.S. at 156-158, 85 S. Ct. at 313-14, despite the fact that pain and suffering has been held to be a non-pecuniary loss, *Sea-Land Services v. Gaudet,* 414 U.S. 573, 585 n. 17, 94 S. Ct. 806, 815 n. 17, 39 L.Ed.2d 9 (1974). However, *Cook* arose in territorial waters and did not address punitive damages, only damages for mental pain and suffering.

In *Kopczynski v. Jacqueline,* 742 F.2d 555, 560-61 (9th Cir. 1984), the court refused to allow punitive damages for a seaman's personal injuries based upon claims of negligence under the Jones Act. It held that all non-pecuniary damages, including punitive damages, were barred by the Act, without distinguishing between wrongful death and personal injury claims. The court found persuasive the discussion set forth in Dahlquist, *Punitive Damages Under the Jones Act,* 6 Mar. Lawyer 1-36 (1981).

Finally, in *Wildman v. Burlington Northern Railway Co.,* 825 F.2d 1392, 1394-5 (9th Cir. 1987), the Ninth Circuit reexamined *Kopczynski* in deciding that punitive damages are not available for personal injury under the FELA. It considered the law as it existed before enactment, the legislative history of the Act, and subsequent amendments. It found the legislative history to be "ambiguous and inconclusive," and reaffirmed the conclusion it reached in *Kopczynski.* The same conclusion was reached by the Sixth Circuit in *Kozar v. Chesapeake & Ohio Railway Co.,* 449 F.2d 1238, 1240-43 (6th Cir. 1971).[4]

The better rule is that the Jones Act does not contemplate punitive damages either for wrongful death or for survival actions on the high seas. It has generally been held that "absent express Congressional intention, punitive damages [are] not recoverable... on a federally created cause of action." *Burris v. Int'l Brotherhood*

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[4] For an extensive discussion of the legislative history of the FELA which reaches the opposite conclusion, *see* the district court's opinion in *Kozar,* 320 F. Supp. 335, 346-57 (W.D. Mich. 1970), *vacated* 449 F.2d at 1243.

Brotherhood of Teamsters, 224 F. Supp. 277, 280 (W.D. N.C. 1963). Where Congress intends that damages in excess of actual damages be recovered, it has found no difficulty using language to express that intent. *United Mine Workers of America v. Patton,* 211 F.2d 742, 749.50 (4th Cir. 1954), *cert. denied* 348 U.S. 824. *See also* Dahlquist, 6 Mar. Lawyer at 27 n. 138 and citations therein.

Again, this debate need not be joined here. Whether or not punitive damages are available under the Jones Act alone, they are not available where a Jones Act survival claim is joined with a DOHSA wrongful death claim. As *Bergen* reasoned, if punitive damages are allowed as an adjunct to a Jones Act survival claim, they could be awarded in many DOHSA cases, circumventing the intent of Congress. *Bergen,* 816 F.2d at 1349. By denying punitive damages under the Jones Act, the statute remains consistent with DOHSA; it also remains consistent with the reasoning of this court in *Higginbotham.* Where a Jones Act claim is joined with a DOHSA claim, punitive damages are not available.

Although this conclusion may pose "a minor threat to the uniformity of maritime law," *Higginbotham,* 436 U.S. at 625, 98 S. Ct. at 2014, *Bergen* is not a new threat to that uniformity, but rather a continuation of the same minor problems which this court was willing to tolerate in *Higginbotham.* As this court has noted, the need for uniformity is far less compelling where recovery has been made available to the plaintiff and only the measure of damages is at stake. *Higginbotham, id.* at n. 18; *see also* Maraist, *Maritime Wrongful Death — Higginbotham Reverses Trend and Creates New Questions,* 39 La. L. Rev. 96-97 (1978). Questions as to the remaining lack of uniformity are properly addressed to Congress. *See Tallentire,* 106 S. Ct. at 2500.

B. *A General Maritime Survival Claim May Not Be Used to Supplement DOHSA and the Jones Act.*

This court has not yet spoken to the issue of whether the general maritime law permits a survival action, but the lower courts have answered the question in the affirmative. Maraist, 39 La. L.Rev. at 81, 93; *see also Azzopardi v. Ocean Drilling & Exploration Co.,* 742 F.2d 890, 894, (5th Cir. 1984); *Evich v. Connelly (Evich I),* 759 F.2d 1432, 1434 (9th Cir. 1985). Regardless of the answer, a different question is presented when that remedy is used as a "supplement" to DOHSA and the Jones Act.

Several circuit courts have held that because DOHSA is a wrongful death statute and contains no survival provision, "it is entirely appropriate that the court should fill what would otherwise be a legislative void by allowing the general maritime law survival action based on *Moragne* to supplement DOHSA." *Azzopardi,* 742 F.2d at 893; *Barbe,* 507 F.2d at 800; *Evich I,* 759 F.2d at 1434.[5] However, language in *Higginbotham* calls these holdings into question:

> The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, *survival,* and damages.

Higginbotham, 436 U.S. at 626, 98 S. Ct. at 2015 (emphasis added). *Higginbotham* was not a survival action, and it is unclear whether this language is meant to be the final word on the subject of survival actions under DOHSA. *See* Smith, *A Maritime Survival Remedy: Is There Life After Higginbotham?* 6 Mar. Lawyer 185 (1981); Maraist, 39 La. L.Rev. at 94[6]. *Bergen* correctly reasoned that such preemption must at least apply to the award of punitive damages, so that the intent of Congress not be thwarted in a large number of DOHSA cases. *Bergen,* 816 F.2d at 1349.

Unlike DOHSA, the Jones Act contains a general survival provision by way of the FELA. *See* 45 U.S.C. Sec. 59. Just as the wrongful death provisions of DOHSA and the Jones Act preempt a wrongful death action under general maritime law, so should

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[5] In *Azzopardi, Barbe,* and *Evich,* no Jones Act claim was presented.

[6] One commentator notes that the conflict between survival actions at general maritime law and DOHSA could be avoided by this court's decision denying survival damages under maritime common law.

> Such a decision arguably would do no violence to the policies which should dictate the path of maritime tort law. It is one thing to say that the beneficiaries of a person killed in maritime employment can recover nothing; it is quite another to say that those beneficiaries cannot recover, in addition to the damages which they have sustained as a result of the death, the 'windfall' of the damages the victim could have recovered if he had lived.

Maraist, 39 La. L.Rev. at 94.

the survival provisions of the Jones Act preempt a general maritime survival action where the Jones Act is applicable.[7] The Jones Act announces Congress' considered judgment on the maritime survival action. Since the Jones Act denies punitive damages, encouraging the creation of non-pecuniary supplements would run contrary to the intent of the Act.[8]

If punitive damages are allowed as an adjunct to a general maritime survival claim, they could be awarded in the majority of DOHSA cases, creating an exception that would swallow the rule.

> Since few deaths at sea are instantaneous, many DOHSA plaintiffs qualify for Jones Act remedies for pre-death pain and suffering. If all of those actions could be supplemented by the general maritime law, DOHSA's preemption of maritime law would be nullified.

Bergen, 816 F.2d at 1349. *Bergen* properly rejected an award of punitive damages under the general maritime law because such an award would reduce DOHSA and the Jones Act to the status of advice.[9]

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[7] In American Export Lines, Inc. v. Alvez, 446 U.S. 274, 284, 100 S. Ct. 1673, 1678, 64 L.Ed.2d 284 (1980), this court stated that the Jones Act lacks preclusive effect on the general maritime law for personal injury actions within territorial waters, and allowed the spouse of a longshoreman to recover damages for loss of consortium. This court stated in dictum that the Jones Act lacks preclusive effect even as to seamen in territorial waters. However, *Alvez* addressed neither a survival action nor an award of punitive damages. *See also* Annotation, *Propriety of Nonpecuniary Damages Award in Action Joining Jones Act Claim With General Maritime Claim Where Cause of Action Arose on Territorial or Inland Waters,* 53 A.L.R.F. 635 (1981).

[8] In *Merry Shipping,* 650 F.2d at 626, the Fifth Circuit reached a contrary conclusion and permitted punitive damages under a general maritime survival claim even though it was joined with a claim under the Jones Act. However, no DOHSA claim was involved.

[9] According to Gilmore & Black, *Law of Admiralty,* 369-70 (2d ed. 1975), *Moragne* "reduced both DOHSA and the FELA death provisions incorporated in the Jones Act to the level of nonstatutory Restatements." However desirable the expansion of the common law, it must be fit around the existing statutory framework.

C. *State Survival Statutes Are Preempted by General Maritime Law and Federal Statutory Remedies.*

Plaintiffs argue that Alaska Statute 09.55.570, providing for survival of causes of action beyond the death of a party, may be used as a supplement to DOHSA or the Jones Act to justify the district court's award of punitive damages. *See Tommy's Elbow Room v. Kavorkian,* 727 P.2d 1038, 1048-49 (Alaska 1986) (punitive damages are recoverable in tort under Alaska law). Although *Tallentire* specifically declined to address this issue, 477 U.S. at 215 n. 1, 106 S. Ct. at 2491 n. 1, it is clear that application of a state survival statute would be completely inconsistent with the law following *Moragne.* Assuming the general maritime law includes a survival action, it must preempt the application of state survival statutes just as state wrongful death statutes are now preempted under *Tallentire. See Wildman,* 825 F.2d at 1395, *Evich II,* 819 F.2d at 258. The need for uniformity requires the preemption of state statutes where the general maritime law applies. *See Nygaard v. Peter Pan Seafoods, Inc.,* 701 F.2d 77, 80 (9th Cir. 1983); *Barbe,* 507 F.2d at 798. The general maritime survival claim is in turn preempted here by DOHSA and the Jones Act.

III. DID THE NINTH CIRCUIT ERR IN HOLDING THAT THE TRIAL COURT'S FACTUAL FINDINGS WERE INSUFFICIENT TO SUPPORT AN AWARD OF PUNITIVE DAMAGES TO THE SURVIVING CREW MEMBERS?

The claims of the two survivors of the St. Patrick accident are not covered by DOHSA, but rather by a negligence action under the Jones Act and an unseaworthiness action under the general maritime law. *Bergen,* 816 F.2d at 1349 n. 3. The reasoning applied in the argument *supra* would suggest that where federal statutes are applicable on the high seas they are preemptive, ruling out the possibility of punitive damages for unseaworthiness under the general maritime law.[10] However, *Bergen* did not reach this legal

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[10] There may be some distinction to be made between actions for negligence and actions for unseaworthiness, thereby leaving room for the argument that the Jones Act has not preempted the field. This issue was specifically left undecided in *Ivy,* 606 F.2d at 528 n. 8. However, punitive damages for unseaworthiness are even less appropriate than for negligence, since the general maritime law of unseaworthiness is akin to strict liability. *See* discussion *infra.*

issue because the court correctly found the factual basis for the awards to be clearly erroneous.[11] *Bergen's* reversal of the trial court does not constitute an unacceptable course of judicial proceedings requiring an exercise of this court's supervision.

In awarding punitive damages for unseaworthiness under the general maritime law, the trial court's legal reasoning was as follows:

> A condition precedent to awarding punitive damages is a showing by the claimants that [the owners] were guilty of gross negligence or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct.
>
> It has specifically been held that punitive damages may also be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing that master.
>
> The acts of petitioners in permitting and at least impliedly directing the vessel to proceed with unlicensed officers were done knowing, or having reason to know, of facts which would lead a reasonable man to realize not only that their conduct created an unreasonable risk to the crew, but also that such risk is reasonably greater than that which is necessary to render their conduct negligent.

Appendix A to Petition for Certiorari at A35-36. The Ninth Circuit reversed, holding that the trial court's findings supported a finding of negligence, but not the willful conduct necessary to support punitive damages in an action for unseaworthiness.

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[11] In the Ninth Circuit, counsel for the owners (no longer counsel before this court) did not argue that punitive damages were unavailable as a matter of law. *Bergen* hinted that were the court to review this issue, it would not necessarily follow the Fifth Circuit in *Merry Shipping* by allowing punitive damages where an unseaworthiness action is joined to an action under DOHSA and the Jones Act. If this court chooses to review this issue, the owners urge it to consider the preemption argument raised *supra*.

Bergen, 816 F.2d at 1349; *see Merry Shipping,* 650 F.2d at 625.[12] A review of the trial court's factual findings reveals that this reversal should be upheld on appeal.

The trial court's findings as to the conduct of the owners with respect to the licensing requirements are set out in Petitioner's Brief at Appendix A; of most relevance are findings 34-65. These findings demonstrate that the three owners knew the master and first mate of the F/V ST. PATRICK were unlicensed to sail on the high seas off the coast of Alaska (findings 44, 46, 51), that they were concerned about failure to meet this requirement and urged the master and first mate to attend to it (findings 38, 41, 46), and that they allowed the ship to go scalloping on the high seas knowing that the requirement had not been met (findings 46, 49, 51). The trial court found that operating the F/V ST. PATRICK without licensed officers was manifestly unsafe (finding 39), and that failure to have licensed officers was in all likelihood the primary cause of the accident (finding 63). The court concluded that this failure was "willful, wanton, and contemptuous" (findings 45, 46, 51), and that is was "in reckless disregard of the safety of the F/V ST. PATRICK's crew in the pursuit of financial gain" (findings 45, 46, 51).

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[12] The petitions for certiorari in this case try to create a question of law where none exists. Plaintiffs maintain that *Bergen* applied an incorrect standard of proof for punitive damages by allowing punitive damages only where "a ship owner has willfully violated the duty to furnish and maintain a seaworthy vessel." *See Merry Shipping,* 650 F.2d at 625. Plaintiffs maintain that the correct standard is "criminal indifference," derived from this court's opinion in Smith v. Wade, 461 U.S. 30, 51, 103 S. Ct. 1625, 1638, 75 L.Ed.2d 632 (1983). *See also* Protectus Alpha Navigation Co., Ltd. v. North Pacific Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985) (punitive damages under the general maritime law may be imposed for conduct which manifests "reckless or callous disregard" for the rights of others); In re Marine Sulfur Queen, 460 F.2d 89, 105 (2d Cir. 1972), *cert. denied sub nom* Marine Sulfur Transport Corp. v. Heard, 409 U.S. 982 (1972) (conduct which shows "gross negligence or actual malice or criminal indifference.") The trial court's award was based upon a melange of the standards, and the *Bergen* court did not concern itself with distinguishing among them. Under the Ninth Circuit's reasoning, the findings of fact do not support an award of punitive damages under any of these standards.

The owners did not dispute the trial court's finding of unseaworthiness. The duty to provide a seaworthy ship is absolute and nondelegable, and the owners' duties were not conditioned on notice or fault. *Deakle v. John E. Graham & Sons,* 756 F.2d 821, 825-26 (11th Cir. 1985). Because the F/V ST. PATRICK was not in compliance with the requirements of the Officer's Competency Certificate Act at the time of the casualty, the owners were *per se* negligent. Nonetheless, violation of the statute by itself will not justify an award of punitive damages.

No evidence was introduced from which it could be inferred that any of the owners had reason to believe that the F/V ST. PATRICK was unseaworthy or that the officers were not in fact competent to carry out their duties. On the contrary, it was undisputed that the F/V ST. PATRICK was a physically seaworthy boat and that the owners reasonably believed that the master and first mate were experienced and competent seamen fit for their assigned duties, apart from the licensing requirement. Both the master and first mate had years of experience running similar vessels in scalloping operations in the North Atlantic, and had the requisite qualifications to be licensed under the Officer's Certificate Competency Act. Under these circumstances, the owners reasonably believed that failure to fill out the paperwork was a violation of a technical requirement unrelated to the safety of the crew.

While the owners acknowledge that this failure constitutes *per se* negligence under a strict liability statute, and actual negligence as well, it does *not* demonstrate either "gross negligence or actual malice or criminal indifference," "reckless or callous disregard" or "reckless and wanton misconduct." Because the master and first mate were otherwise qualified to perform their duties and had only to fill out the proper paperwork in order to do so, it cannot be said that the owners were criminally indifferent or reckless as to the safety of the crew. It is enough that the owners have been made liable by virtue of strict liability; imposition of punitive damages is not warranted and is unsupported by the record. The *Bergen* court was properly left with "the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 92 L.Ed. 746, 766, 68 S. Ct. 525 (1948). In any case, *Bergen's* reversal of the trial court does not constitute an unacceptable course of judicial proceedings requiring an exercise of this court's supervision.

CONCLUSION

Bergen reaffirmed that DOHSA provides only pecuniary remedies for wrongful death on the high seas and preempts any claim for punitive damages under the general maritime law. This should be a settled question after *Higginbotham,* and a grant of certiorari is unnecessary.

Bergen also held that whether or not punitive damages for unseaworthiness are available to the survivor of an accident under general maritime law, they are not available here where the trial court's factual findings fail to demonstrate anything more than negligence on the part of the owners. This does not constitute an unacceptable course of judicial proceedings requiring an exercise of this court's supervision.

Finally, *Bergen* held that punitive damages for pre-death pain and suffering under the general maritime law or state law are not available to supplement an action under DOHSA and the Jones Act. Although this is currently an unsettled area of the law, *Bergen* is a correct and logical successor to this court's earlier decisions. If certiorari is to be granted at all, the owners suggest that it be limited to this one issue. *See Higginbotham,* 436 U.S. at 621, 98 S. Ct. at 2012.

Respectfully submitted.

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July 21, 1989

APPENDIX

ALASKA STATUTES RELIED UPON

Sec. 09.55.570. All causes of action survive. All causes of action by one person against another, whether arising on contract or otherwise, except those involving defamation of character, survive to the personal representatives of the former and against the personal representatives of the latter, but this shall not be construed so as to abate an action for a wrong where any party has died after the verdict or to defeat or prejudice the right of action given by AS 09.15.010. The personal representatives may maintain an action thereon against the party against whom the cause of action accrued, or, after the party's death, against the personal representatives of the party.

Sec. 09.55.580. Action for wrongful death. (a) When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission. The action shall be commenced within two years after the death, and the damages therein shall be the damages the court or jury may consider fair and just. The amount recovered, if any, shall be exclusively for the benefit of the decedent's spouse and children when the decedent is survived by a spouse or children, or other dependents. When the decedent is survived by no spouse or children or other dependents, the amount recovered shall be administered as other personal property of the decedent but shall be limited to pecuniary loss. When the plaintiff prevails, the trial court shall determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.

(b) The damages recoverable under this section shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.

(c) In fixing the amount of damages to be awarded under this section, the court or jury shall consider all the facts and

circumstances and from them fix the award at a sum which will fairly compensate for the injury resulting from the death. In determining the amount of the award, the court or jury shall consider but is not limited to the following:

(1) deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations of what the deceased may have saved during the lifetime of the deceased;

(2) loss of contributions for support;

(3) loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries;

(4) loss of consortium;

(5) loss of prospective training and education;

(6) medical and funeral expenses.

(d) The death of a beneficiary or beneficiaries before judgment does not affect the amount of damages recoverable under this section.

(e) The right of action granted by this section is not abated by the death of a person named or to be named the defendant.

Supreme Court, U.S.
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AUG 2 1989
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CLERK

No. 88-1762

In The

Supreme Court of the United States

October Term, 1988

ROBERT KIDD, et al.,

Petitioners,

vs.

THE F/V ST. PATRICK, et al.,

Respondents.

AGNES BERGEN, et al.,

Cross-Petitioners,

vs.

THE F/V ST. PATRICK, et al.,

Cross-Respondents.

REPLY TO RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ARGUMENT

I. RECOVERY OF PUNITIVE DAMAGES UNDER A SURVIVAL REMEDY

A. NO NEED TO REVERSE OFFSHORE LOGISTICS AND HIGGENBOTHAM

In the very introduction to their opposition, pg. 2, Defendants seek to characterize as a concession of weakness the passing suggestion of plaintiffs that one alternative to again attempting to navigate this chartless Sargasso Sea which *Mobil Oil Corp. v. Higgenbotham*, 436 US 618, 86 L.Ed.2d. 581 (1978) sets this court to cross, is to do what *Moragne v. State Marine Lines Inc.*, 398 US 375, 26 L.Ed.2d. 339 (1970) did after years of similar attempts, and return to the beginning.

Higgenbotham reset the course and mandated that the considered intent of Congress be the polestar; and to paraphrase Admiral Farragut, ordered, "Damn the inconsistencies; full speed ahead!" But *Offshore Logistics v. Tallentire*, 477 US 207, 91 L.Ed.2d. 1974 (1986) revealed what a perilous order that was, ramming the good ship "wrongful death recovery" upon a reef of severe inconsistency in DOHSA's legislative history, and holing this vessel, which only major patchwork could contain.

In making these emergency repairs this court has and will take criticism that it too bent Congressional intent no less than the *Moragne* court did. But Plaintiffs' suggestion that the *Moragne* course is the lesser of two evils promoting the cause of complete uniformity in maritime law and justice, is no concession that *Higgenbotham's* course weakens their particular plank in this ship. On the contrary, this case perhaps provides a method whereby the principals of Higgenbotham and *Moragne* can be reconciled and the voyage continued indefinitely in an acceptable fashion until such times, if ever, Congress comes to its rescue.

B. STATUTORY OVERVIEW

Defendants only briefly address and appear to tacitly concede that punitive damages are recoverable in an appropriate maritime tort. See Response, pg. 2. Instead Defendants' argument appears limited to the proposition that punitive damages should merely not be permitted in a "wrongful death" action, (including a survival action) due to Congress' "considered judgment" on the issue in DOHSA (and the Jones Act), which Defendants argue *Higgenbotham* then prohibits this court in fashioning any maritime common law remedy to correct.

Petitioners will refute that analysis, but they do not contest that the "statutory overview" described by defendants at pg. 2-3 generally frames the legal context in which this issue arises, although it contains several errors.

First, there is DOHSA; it does not expressly include a survival provision, but neither does it expressly reject the remedy. Maraist, *Maritime Wrongful Death – Higgenbotham Reverses Trends and Creates New Questions*, 39 La. L.R. 81, 92 (1978); Smith, *A Maritime Survival Remedy: Is There Life After Higgenbotham?* 6 Mar. Lawyer, 185 (1981).

Second, there is the Jones Act. Though enacted by the same Congress that enacted DOHSA, it was not enacted at the same time, and its provisions are so hopeless in conflict with DOHSA on many major provisions that little can be gleaned as to Congress' intent as to the relationship between them. *American Export Lines v. Alvez*, 446 US 274, 283, 100 S.Ct. 1673, 1678 (1980). Unlike DOHSA, the Jones Act does include an express survival remedy for personal injury before death in its incorporation of FELA, 45 USCA § 59. See Hughes, *Death Actions In Admiralty*, 31 Yale L.R. 115, 119-120, 124 (1921). Punitive damages for injuries under the Jones Act are not explicitly precluded, though some lower courts have held that they are. Other lower courts have recently questioned those holdings. *Complaint of Merry Shipping*, 650 F.2d. 622, 626 (5th Cir., 1981). But it is not an unsettled question as to whether

damages are limited to pecuniary loss in a Jones Act survival action. On the contrary, this court expressly held they are not. *Gillespie v. United States Steel Corp.*, 379 US 148, 156, 13 L.Ed.2d. 199, 205 (1964); see also, *Cook v. Ross Island Sand & Gravel*, 626 F.2d 746 (9th Cir., 1980).

Third, the general maritime law provides a remedy for wrongful death based on unseaworthiness for seamen and negligence to others. Though Defendants state that this Court has not addressed whether the general maritime law includes a survival action for nonpecuniary loss, Defendants concede that all the courts that have considered the issue,[1] except the *Bergen* court here, have allowed the recovery, including a cause of action for punitive damages. And Defendants ignore contrary language in *Kernan v. American Dredging Co.*, 355 US 426, 430, Fn. 4, 2 L.Ed.2d. 382, 387 (1958), and reaffirmed in *Gillespie*, supra, 379 US at 137, 13 L.Ed.2d. at 206 (1964). The Jones Act recovery for a seaman may be joined with a DOHSA action and recovery had under both. *Moragne*, supra, 398 US at 396, Fn. 12, 26 L.Ed. at 354.

Finally, whether plaintiffs (particularly non-seamen) may look to a state survival statute to supplement DOHSA (which is silent as to a survival remedy) was expressly and pointedly left open in *Offshore Logistics Inc. v. Tallentire*, 477 US at 218, Fn. 1, 91 L.Ed.2d. at 184 Fn. 46 (1986). Defendants concede Alaska has such a survival statute, and that punitive damages are recoverable under

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[1] Those Court of Appeals decisions being *Dugas v. National Aircraft*, 438 F.2d. 1386, 1390 (3rd Cir., 1971); *United States Steel Corp. v. Furman*, 407 F.2d. 1143, 1148 (6th Cir., 1969); *In Re. Marine Sulphur Queen*, 460 F.2d. 89, 105 (2nd Cir., 1972), *cert den sub nom Marine Sulphur Trans Corp. v. Head*, 409 US 982, 34 L.Ed.2d. 246 (1972); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir., 1974); *Complaint of Merry Shipping* supra, *Evich v. Morris* (Evich II), 819 F.2d. 256 (9th Cir., 1987); and now *Matter of P&E Boat Rentals Inc.*, 872 F.2d. 642, 650 (5th Cir., 1989).

it, and nowhere contest that Alaska's survival statute has been expressly made applicable to the high seas, AS 44.03.010-.040.

With the foregoing statutory framework as corrected, Plaintiffs will proceed to reply to each of Defendants underlying argument in response to Plaintiffs' petition, although to more clearly demonstrate their point Plaintiffs will reorder them.

C. NONPECUNIARY DAMAGES, INCLUDING PUNITIVE DAMAGES, ARE AVAILABLE UNDER A JONES ACT SURVIVAL ACTION WITH OR WITHOUT DOHSA

Defendants argue at pg. 6 of their opposition that the Jones Act precludes recovery of nonpecuniary punitive damages, but their argument truly begs the point which is, does the Jones Act mean what it says in its grant of a "survival remedy" pursuant to its incorporation of FELA, 45 USCA § 59, by reference, and is *Gillespie v. United States*, supra, good law? If the answer is yes, Defendants' argument must fail, because the law is clear that seamen such as Plaintiffs are entitled to the benefits of *both* the Jones Act and DOHSA in a high seas accident. *Moragne*, 398, supra, at 396 Fn. 12, 26 L.Ed. at 254. And it is then irrelevant whether DOHSA's absence of an express survival remedy, is an indication of Congressional intent to preclude a survival action and thereby under the auspices of *Higgenbotham*, this Court is precluded from creating one.

This concept is a lynchpin in the analysis which Defendants wish to ignore, because if the fact that Congress intended seamen a survival action including nonpecuniary loss is considered separate and apart from the elements of that action (i.e., whether it may include punitive damages or not), then there is nothing to suggest that when Congress passed DOHSA (months before the Jones Act) it intended to deny seamen a right to nonpecuniary loss in some judicially created wrongful death and survival action that would be created at common law,

following development in the law of unseaworthiness in the 1940's and *Moragne* in 1970. See Gilmore & Black, *Law of Admiralty*, 2d, 383-396. On the contrary, then the Jones Act clearly evidences Congress' "considered judgment" that seamen should have the benefits of a survival action regardless where their predeath injuries occurred, and the law has always been that the seaman's remedy for *injuries* due to unseaworthiness have followed him onto the high seas. This principal is so clear that as noted by the court of appeals below, Defendants conceded both Plaintiffs' entitlement to both the nonpecuniary damages of predeath suffering and the surviving seamen's legal entitlement to a punitive damages award. *Bergen v. F/V ST. PATRICK*, 816 F.2d. 1345, 1349 Fn. 2, 3.

The only remaining question then under the Jones Act analysis is whether the nonpecuniary damages due an injured seaman under the Jones Act is somehow limited to deny punitive damages? As Defendants acknowledge in their opposition, pg. 6-7, this is an unsettled area of law, with an unsettling conclusion. Namely, that if there is no recovery for punitive damages, it must arise out of the "pecuniary loss" language for wrongful *death* damages. The failure of this analysis is that, as Plaintiffs have previously pointed out, this restriction would also deny injured seamen recovery for pain and suffering (predeath or otherwise), and that is neither logical nor is it the law. *Gillespie*, supra.

It is on the other hand not illogical that Congress would deny a seaman or a railway worker *death* damages beyond pecuniary loss. At the time of the passage of both FELA and the Jones Act there was no cause of action for wrongful death. *Moragne*, supra. Dahlquist, *Punitive Damages Under the Jones Act*, 1, 22-26 (1981), concludes that the legislative history of these acts are silent as to Congressional intent in this regard. But Judge Fox in *Kozar v. Chesapeake & Ohio Railway Company*, 320 F.Supp. 335 (W.D. Mich., 1978); overruled *Kozar v. Chesapeake & Ohio Railway*

Co., 449 F.2d. 1238 (6th Cir., 1971), disagrees. More significantly Dahlquist ignores the "pecuniary loss" language in the wrongful *death* recovery provisions of FELA, but its absence from the injury and survival provisions despite a proposed amendment to the 1910 revision of FELA to provide for such a limitation in the survival remedy. *Wildman v. Burlington Northern R. Co.*, 825 F.2d. 1392 (9th Cir., 1987).

The only thing that would apparently satisfy Defendants is the existance of an express punitive damages provision. However, this court, in the absence of clear legislative intent, has never imposed such a strict requirement on any other act of Congress granting a "new" tort remedy. On the contrary, in the absence of an expression of Congressional intent, the presumption is Congress intended the common law, as it existed at the time of the legislation to provide the elements of the remedy. And by 1910 punitive damages clearly were recognized. Compare *Smith v. Wade*, 461 US 30, 75 L.Ed.2d. 632 (1983).

Aside from the salutary effect of punitive damages such a result promotes uniformity of recovery by seamen who clearly have this element in an unseaworthiness action.

1. NONPECUNIARY DAMAGES (INCLUDING PUNITIVE DAMAGES) ARE AVAILABLE UNDER THE GENERAL MARITIME LAW SURVIVAL ACTION WHEN JOINED WITH A JONES ACT CLAIM AND A CLAIM UNDER DOHSA

It is the 9th Circuit's decision in *Bergen* below not to award punitive damages under the general maritime law which puts it in direct conflict with the 5th Circuit's decision in *Complaint of Merry Shipping*, supra, recently reaffirmed in *P&E Boat Rentals*, supra, and its own circuit in *Evich II*, supra. Even if this court were to conclude that the Jones Act does not include a remedy for punitive damages, the undisputed conclusion of all courts considering the issue is that the general maritime law does.

This being the case, the only question is as Smith, supra, asks: *A Maritime Survival Remedy: Is There Life After Higgenbotham?* The response is that if there is not, insofar as this policy applies to seamen, then the denial of this common law remedy does at least as much injustice to Congress' considered judgment expressed in the survival provisions of the Jones Act, as it does to whatever can be said of Congress' considered judgment in failing to mention such a remedy in DOHSA. *Higgenbotham* of course did not consider this issue, because that was not a seaman's case. Nor was *Offshore Logistics*.

Nor was *Higgenbotham* a survival action, and as a result it failed to expressly consider the meaning of the only provision in DOHSA, 46 USCA § 765, addressing survival, which does not deny a survival remedy. Smith, supra, at 195-197. See also, Maraist, supra, at 94. In the absence of a statute directly addressing the issue this court is free to judicially craft a remedy under the general maritime law. *Alvez*, supra, 446 US, at 282, 100 S.Ct. at 1678 (1980). It would appear that this observation was the reason this court pointedly wrote Fn. 1 in *Offshore Logistics*, supra, 477 US at 215, 91 L.Ed. at 184.

Abrogation of a common law survival remedy would not promote uniformity as Professor Morist obliquely suggests, because there would still remain a Jones Act survival remedy at least within territorial waters, even if it could have somehow said to not exist when joined with a DOHSA action.

The denial of a survival action also leads to the absurd result that it is all right to kill a man, but not to injure him; and if no punitive damages remedy exists under the Jones Act, survival remedy, why not? Since many seamen do tend, by the nature of their calling to be without families, this implication is particularly grave. At the very least, it would be a disincentive to rescue. All these reasons and more led to the general common law or statutory survival actions that exist throughout the United States today.

2. STATE SURVIVAL STATUTES

Because Plaintiffs are all seamen having a Jones Act survival remedy, including an action for punitive damages, it is unnecessary for this court to address the issue here expressly left open by *Offshore Logistics*, supra, Fn. 1, as to whether a state survival law may supplement DOHSA or whether DOHSA may be supplemented by the general maritime law.

As previously noted, the controversy in *Offshore Logistics* lends credibility to the argument that it was the considered judgment of Congress to allow this remedy, but that judgment predated *Moragne*.

If on the contrary, the legislative history suggests that Congress did not consider survival actions, the principal of uniformity would suggest a general maritime law survival action. That such an action could engulf DOHSA because as the court below observed, few deaths at sea are instantaneous, merely means that for most high seas deaths, there will be a remedy. Whereas currently for many, perhaps very negligent deaths under DOHSA, there is none.

However, in the remote event this court were to reach this issue, Plaintiffs have no reservations of taking "any port in a storm". As the strong dissent in *Offshore Logistics* points out, it was the intent of Congress that state law remedies be available even on the high seas. Alaska, having granted that remedy, it is the will of Congress that remedy be enforced as a supplement to DOHSA.

II. THE 9TH CIRCUIT DID ERR IN HOLDING THAT THE TRIAL COURT'S FACTUAL FINDINGS WERE INSUFFICIENT TO AWARD PUNITIVE DAMAGES

On this petition for certiorari, this court does not have the record, only the trial court's findings. If the Defendants wish to somehow establish that the master and mate of this vessel were well qualified, and that their only error was to fail to "fill out proper paperwork", they

must support this claim with the record, because the law is clear that the ST. PATRICK required not merely a master and mate, but also an engineer, and that 46 CFR § 10.15-31(b) (2) IV, (C) (V), (e) (2) required that the holder of each 200 ton master, mate and engineer license must pass a test which could have prevented this accident. Petition Appendix A-33, Conclusion 4. Defendants simply ignore that they knew that none of their officers had taken this test, and that in its absence we have only Defendants' unsubstantiated word as to their qualifications. Moreover, Defendants blithely overlook that they personally knew they had never even went so far as handing an application to some "would be" engineer, and that they has personal knowledge that their "would be" master had left the vessel before the voyage, and that they *personally* knew well before the fatal storm that she was solely in command of her "would be" mate. It was not merely a lack of licensed officers of which Defendants were personally warned, but a near total lack of any officers of which Defendants were also personally aware; and despite Coast Guard warnings and a promise of compliance, nevertheless specifically ignored, that caused the deaths of ten men and the severe injuries to two.

Defendants criticize the Plaintiffs for creating issues of law where none exist. But a court of appeals review of a trial court's findings is one of law. More importantly, following the recent decision of the 5th Circuit in *Matter of P&E Boat Rentals*, supra, at 650, to follow the 6th Circuit in *Furman*, supra, and rejecting the 9th Circuit's view expressed in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*, 767 F.2d. 1379 (9th Cir., 1985), a split between the circuits now exists which would justify this court's intervention on the issue of the proper circumstance for an award of punitive damages, as well as the grounds of a far departure from the accepted and usual course of judicial proceedings.

Plaintiffs respectfully suggest that regardless of which circuit's views on the subject is adopted, the test is

met here by these Defendants, all corporate officers who had personal longstanding notice of these statutory deficiencies and willfully chose to continuously ignore them despite their promises to the Coast Guard.

CONCLUSION

The implementation of an award of punitive damages of a Jones Act, general maritime law, or state supplementary survival action in this case will effectuate the considered judgment of Congress in the Jones Act, and will not thwart its intent under DOHSA. Moreover, it will recreate most of the uniformity that was attempted in *Moragne*, and at the same time provide a comprehensive and fair maritime recovery to all persons killed upon maritime waters which directly complements the rights of persons injured on maritime waters.

If following the judicial recognition of such a common law remedy, Congress wishes to intervene to amend Dohsa to provide for that small class of persons comprising nonseamen, who are killed instantly and leave no person suffering pecuniary loss, it may simply do so. If on the other hand, Congress elects to leave this complex area untouched as it has since 1920, this court can be assured that without impeding the will of Congress, a generally fair system of maritime recovery for wrongful death may exist indefinitely. And this heretofore endless voyage in search thereof in this and the numerous lower courts may finally come to a just end.

Respectfully submitted on this 1st day of August, 1989, from Kodiak, Alaska.

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